(21,252.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 456.

CHARLES RICHARDSON, PLAINTIFF IN ERROR,

vs.

H. V. McCHESNEY, SECRETARY OF STATE OF THE COMMONWEALTH OF KENTUCKY, ET AL.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 12, 1909.

1 THE COMMONWEALTH OF KENTUCKY:

Pleas before the Honorable the Court of Appeals of Kentucky, at the Capitol, at Frankfort, on the 11th Day of March, A. D. 1908.

CHARLES RICHARDSON, Appellant,

vs.

H. V. McCHESNEY, Secretary of State, &c., Appellees.

Appeal from Green Circuit Court.

Be it remembered that the appellant by his attorney on the 27th day of August, 1907, filed in the office of the Clerk of the Court of Appeals a transcript of the record which is in words and figures as follows, to-wit:

2 Green Circuit Court.

CHARLES RICHARDSON, Plaintiff,

vs.

H. V. McCHESNEY, Secretary of State, of the Commonwealth of Kentucky; P. F. MARSHALL, Clerk of the County Court of Green Co., Ky.; E. E. BIGGS, Clerk of the County Court of Hart Co., Ky.; S. E. KERR, Clerk of the County Court of Taylor Co., Ky., Defendants.

Petition in Equity.

The plaintiff, Charles Richardson, states that he is a citizen, elector, voter and taxpayer of the County of Hart and State of Kentucky; that he was born in the United States, is subject to the jurisdiction thereof, and is a citizen of the United States of America; that he is over twenty-four years of age, and has for more than two years last past resided and still resides in said county and state; that he has all the qualifications requisite for electors of the most numerous branch of the State Legislature of Kentucky, to-wit, the House of Representatives of the General Assembly of the Commonwealth of Kentucky, and is entitled and qualified to vote for member of said House of Representatives from and for the Representative District of Kentucky in which said county of Hart is situated,

3 and is entitled and qualified to vote for member of the House of Representatives in the Congress of the United States from and for the Congressional district in which said county of Hart is situated, at the election to be held for member of the House of Representatives in the Congress of the United States in said county and Congressional district on the first Tuesday after the first Monday in November, 1908. Plaintiff states that the defendant H. V. McChesney is the duly elected, qualified and acting Secretary of State of the Commonwealth of Kentucky; that the defendant P. F. Marshall

is the duly elected, qualified and acting clerk of the County Court of Green County, Kentucky; that the defendant E. E. Biggs is the duly elected, qualified and acting clerk of the County Court of Hart County, Kentucky; and that the defendant S. E. Kerr is the duly elected, qualified and acting clerk of the County Court of Taylor County, Kentucky. Plaintiff states that his right and privilege to vote at said congressional election is the privilege belonging to him as a citizen of the United States and is guaranteed to him as such citizen by the Constitution and laws of the United States and by the Constitution of Kentucky. Plaintiff says that the Constitution of the United States provides and requires that Representatives in the Congress of the United States shall be apportioned among the several states according to their respective numbers; that by
4 the Act of Congress, approved February 25, 1882, Entitled "An Act making an apportionment of Representatives in Congress among the several States under the Tenth Census," it is provided and required that in each State the number of Representatives to which such state may be entitled in the Forty-eighth and each subsequent Congress shall be elected by districts composed of contiguous territory and containing as nearly as practicable an equal number of inhabitants, and equal in number to the number of representatives to which such State may be entitled in Congress, no one district electing more than one representative, and that said provision and requirement remained and was in full force and effect as a law of the United States on May 26, 1890, and is still in full force and effect; that by the act of Congress, approved February 7, 1891, Entitled "An act making an apportionment of Representatives in Congress among the several States under the Eleventh census" it was provided and required that in each State the number of Representatives to which such State may be entitled in the Fifty-third and each subsequent Congress shall be elected by districts composed of contiguous territory and containing as nearly as practicable an equal number of inhabitants, and equal in number of Representatives to which such State may be entitled in Congress, no one district
5 electing more than one representative; and that said provision and requirement remained and was in full force and effect as a law of the United States and on March 11th and 12th, 1898, and is still in full force and effect; that by the act of Congress approved January 16, 1901 Entitled an act making an apportionment of Representatives in Congress among the several States under the twelfth census" it was provided and required that in each State the number of Representatives to which such state may be entitled in the Fifty-Eighth and each subsequent Congress shall be elected by districts composed of contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants, and that said districts shall be equal in number to the number of Representatives to which such State may be entitled in Congress, no one district electing more than one representative, and the said act and said provision and requirement remain and are still in full force and effect as a law of the United States.

Plaintiff states that by the act of the General Assembly of the Com-

monwealth of Kentucky, approved April 15, 1882, entitled an Act to apportion the state into eleven Congressional districts," the State of Kentucky was laid off into eleven Congressional districts composed as follows, to-wit:

The First district, composed of the counties of Fulton, Hickman, Graves, Ballard, McCracken, Marshall, Galloway, Trigg, Lyon, Livingston, Crittenden and Caldwell.

The second district composed of the counties of Christian, Hopkins, Webster, Union, Henderson, McLean, Daviess and Hancock.

6 The Third district, composed of the counties of Muhlenburg, Todd, Logan, Butler, Edmondson, Warren, Simpson, Allen, Monroe, Cumberland and Clinton.

The Fourth district composed of the counties of Ohio, Grayson, Breckinridge, Meade, Hardin, Bullitt, Nelson, Larue, Marion, and Washington.

The Fifth district, composed of the counties of Jefferson.

The Sixth district composed of the counties of Trimble, Carrol, Gallatin, Grant, Boone, Kenton, Campbell and Pendleton.

The Seventh district, composed of the counties of Oldham, Henry, Owen, Franklin, Scott, Harrison, Bourbon, Fayette and Woodford.

The Eighth district, composed of the counties of Shelby, Spencer, Anderson, Mercer, Boyle, Lincoln, Garrard, Jessamine, Madison, Rockcastle, Jackson, Owsley and Laurel.

The Ninth district, composed of the counties of Bracken, Mason, Robertson, Nicholas, Fleming, Bath, Rowan, Lewis, Greenup, Carter, Boyd, Lawrence, Johnson, and Martin.

The Tenth district, composed of the counties of Pike, Letcher, Floyd, Magoffin, Morgan, Elliott, Menifee, Wolf, Powell, Montgomery, Clark, Estill, Lee, Breathitt, Perry, Clay, Leslie, Knox, Bell and Harlin.

7 The Eleventh district composed of the counties of Whitley, Wayne, Pulaski, Casey, Russell, Adair, Taylor, Green, Metcalfe, Barren, and Hart.

But plaintiff says that by a pretended and invalid and unconstitutional act attempted to be enacted by the General Assembly of the Commonwealth of Kentucky, approved May 26, 1890, it was attempted to lay off the State of Kentucky into eleven Congressional districts composed as follows, to wit:

The First district, composed of the counties of Ballard, Caldwell, Calloway, Carlisle, Crittenden, Fulton, Graves, Hickman, Livingston, Lyon, Marshall, McCracken, and Trigg.

The Second district, composed of the counties of Christian, Daviess, Hancock, Henderson, Hopkins, McLean, Union, and Webster.

The Third district, composed of the counties of Allen, Butler, Barren, Cumberland, Edmondson, Logan, Monroe, Muhlenburg, Simpson, Todd, and Warren.

The Fourth district, of the counties of Breckinridge, Bullitt, Grayson, Green, Hardin, Hart, Larue, Marion, Meade, Nelson, Ohio, Taylor, and Washington.

The Fifth district, composed of the county of Jefferson.

The Sixth district, composed of the counties of Boone, Campbell, Carrol, Gallatin, Grant, Kenton, Pendleton, and Trimble.

8 The Seventh district, composed of the counties of Bourbon, Fayette, Franklin, Henry, Oldham, Owen, Scott, and Woodford.

The Eighth district, composed of the counties of Anderson, Boyle, Garrard, Jessamine, Lincoln, Madison, Mercer, Rockcastle, Shelby, Spencer, and Jackson.

The Ninth district, composed of the counties of Bracken, Bath, Boyd, Carter, Fleming, Greenup, Harrison, Lewis, Lawrence, Mason, Nicholas, Robertson, and Rowan.

The Tenth district, composed of the counties of Breathitt, Clark, Elliott, Estill, Floyd, Johnson, Knott, Lee, Martin, Magoffin, Montgomery, Morgan, Menefee, Pike, Powell, and Wolfe.

The Eleventh district, composed of the counties of Adair, Bell, Casey, Clay, Clinton, Harlan, Knox, Letcher, Leslie, Laurel, Metcalfe, Owsley, Perry, Pulaski, Russell, Wayne, and Whitley.

Plaintiff states that by another pretended invalid, and unconstitutional act, approved March 12, 1898, it was attempted by the General Assembly of the Commonwealth of Kentucky to take the counties of Cumberland and Monroe from the Third Congressional District of Kentucky and to add them to the Eleventh Congressional District of Kentucky, and to take the county of Metcalf, from the Eleventh Congressional District of Kentucky and add said

9 county to the Third Congressional District of Kentucky, and that by a pretended and invalid and unconstitutional act, approved March 11, 1898 it was attempted by the General Assembly of the Commonwealth of Kentucky to take the county of Jackson from the Eighth Congressional District of Kentucky, and add said county to the Eleventh Congressional District of Kentucky. Plaintiff states that according to the United States Census of 1880, and in fact, the population of the State of Kenucky was 1,648,690 and the average population of each of the Eleven Congressional Districts was 149,881, that according to the Census of 1890, and in fact, the population of the State of Kentucky was 1,858,635, and the average population of each Congressional district was 168,966: that according to the Census of 1900, and in fact, the population of the State of Kentucky was 2,247,174, and the average population of each Congressional District was 195,197: that according to said three Censuses of the United States, and in fact, the population of said pretended and unlawful eleven Congressional districts attempted to be created by said invalid and unconstitutional acts of the General Assembly of the Commonwealth of Kentucky, approved respectively May 26, 1890, March 12, 1898, and March 11, 1898, the aggregate population of the counties composing each of said pretended districts was as follows, to wit:

10

First District.

1880	
1890	149740
1900	170500
	201956

Second District.

1880	152960
1890	174805
1900	203216

Third District.

1880	156858
1890	166631
1900	179518

Fourth District.

1880	188124
1890	192064
1900	210314

Fifth District.

1880	146010
1890	188598
1900	232549

11

Sixth District.

1880	144160
1890	160649
1900	179430

Seventh District.

1880	13003–
1890	141461
1900	151453

Eighth District.

1880	128656
1890	134510
1900	143089

Ninth District.

1880	164085
1890	176177
1900	200064

Tenth District.

1880	114024
1890	149068
1900	187171

Eleventh District.

1880	172630
1890	213282
1900	257582

12 Plaintiff says that the state can be divided into eleven districts of compact and contiguous territory and each approximately and reasonably equal in inhabitants and that said pretended acts of May 26, 1890, March 12, 1898, and March 11, 1898, are unconstitutional and void, that they are in violation of the provisions of the Constitution of the United States which guarantee to every State in the Union a Republican form of government, and to the citizens thereof and to the citizens of the United States equal rights and representation; that they are in violation of the first, second, and third and fourth sections of the Constitution of Kentucky and in violation of the sixth section of said Constitution which provides that all elections shall be free and equal; that said pretended acts are violations of and repugnant to the act of Congress, approved February 2, 1872, and are violations of and repugnant to the act of Congress, approved February 25, 1882, and are violations of and repugnant to said act of Congress approved February 7, 1891, which requires the Congressional districts of the several States to be composed of contiguous territory and to contain as nearly as practicable an equal number of inhabitants, and that said pretended acts of May 26, 1890, and March 12, 1898, and March 11, 1898, are also in violation of and repugnant to said act of Congress of the
13 United States, approved January 16, 1901, which requires members of said Congress to be elected by districts composed of contiguous and compact territory. Plaintiff says that said pretended eleven Congressional districts so attempted to be created by said unconstitutional and unlawful acts of the General Assembly of the Commonwealth of Kentucky do not contain as nearly as practicable an equal number of inhabitants, but utterly ignore the principle and rule of equality; that according to the censuses of the United States of 1890 and of 1900, said pretended districts so attempted to be created have population respectively in excess or in deficit of the average population of a Congressional District as follows, to wit:

	Census of 1890.		Census of 1900.	
First District	Excess	1534	Excess	6768
Second District	Excess	5839	Excess	8238
Third District	Deficit	2335	Deficit	15580
Fourth District	Excess	23098	Excess	15216
Fifth District	Excess	19632	Excess	37451
Sixth District	Deficit	8317	Deficit	15668
Seventh District	Deficit	27505	Deficit	43625
Eighth District	Deficit	34456	Deficit	51989
Ninth District	Excess	7211	Deficit	4966
Tenth District	Deficit	19898	Deficit	7929
Eleventh District	Excess	44314	Excess	62484

14 Plaintiff states that said pretended Fourth District has a great excess of population above the average population of a Congressional District, and that the holding of Congressional elections in said pretended Fourth District under said unconstitutional apportionment acts of the General Assembly of the Commonwealth of Kentucky deprive this plaintiff and other citizens of said various districts of equal representation in Congressional elections and in Congress of the United States and thereby abridge the privileges of plaintiff and said other citizens of the United States as such citizens. Plaintiff states that in all of the Congressional districts of Kentucky the Republican and Democratic parties will respectively nominate candidates for election to the House of Representatives of the Congress of the United States, and the chairman and secretaries of the conventions which shall nominate such candidates will in due time not more than sixty nor less than thirty days before the Congressional election to be held in November, 1908, certify to the defendant, H. V. McChesney, as Secretary of State of the Commonwealth of Kentucky, and to his successor in said office, if he shall not then be the incumbent of said office, the names of said nominees in said Congressional districts; that the republican party will nominate a candidate and the Democratic party will nominate a
15 candidate for the office of member of the House of Representatives in the Congress of the United States from and for the Fourth District of said State, and will file in the office of the Secretary of State of the Commonwealth of Kentucky, a certificate of nomination of each of said candidates, and that the like action will be taken by the chairman and secretaries of the various Republican and Democratic conventions held in the various Congressional districts of the State of Kentucky, and that unless restrained and enjoined there from by this Honorable Court the said defendant, H. V. McChesney, Secretary of State as aforesaid, and his successor in said office, if he shall not then be the incumbent of said office will certify said candidates whose names shall be so certified to such Secretary of State as the nominees of the Republican and Democratic parties respectively to the County Court Clerks of all the counties attempted by said invalid and unlawful and unconstitutional acts to be embraced in said pretended and unlawful Fourth Congressional District, and will certify said names to said County Court Clerks in said counties of Green, Hart and Taylor, to the great and irreparable damage and injury of plaintiff; that said counties of Green, Hart and Taylor are not lawfully a part of said Fourth Congressional District and have not been removed from the Eleventh Congressional District of Kentucky or placed in any other Congressional District of said State by any lawful or constitu-
16 tional act of the General Assembly of the Commonwealth of Kentucky, but said defendant H. V. McChesney, Secretary of State as aforesaid, and his successor in said office if he shall not then be the incumbent of said office will, unless enjoined and restrained therefrom by order of this Court, refuse to certify the names of the Republican and Democratic and other candidates nominated by their respective parties in the Eleventh Congressional District to

the said County Court Clerks of Green, Hart and Taylor counties, which are constituent parts of the Eleventh Congressional District of Kentucky, to be by said Clerks printed and caused to be printed upon the ballots to be used at said election for member of Congress of the United States in November, 1908; and said defendants said H. V. McChesney's successor in office will continue to act in like manner as to nominees for Congress in the Commonwealth of Kentucky unless this Court shall enjoin and restrain him therefrom. And plaintiff says that unless enjoined and restrained therefrom by this court, the said defendants said clerks of the County Courts of the Counties of Green, Hart and Taylor, will print and cause to be printed upon the ballots to be used in said counties at said elections for members of Congress in November, 1908, the names of
17 the persons nominated for Congress by said Republican and Democratic parties respectively in said pretended and unlawful Fourth Congressional District of Kentucky and will refuse to print and cause to be printed upon said ballots to be used in said counties at said election the names of the persons nominated for Congress in the Eleventh Congressional District of Kentucky by said parties respectively, as the nominees for Congress of said parties respectively to be voted for in said counties at said election in November, 1908.

Wherefore, Plaintiff, having no adequate or in fact any remedy at law, prays that said pretended acts, approved May 26, 1890, March 12, 1898, and March 11, 1898, be declared unconstitutional, and void and repugnant to and in violation of the acts of Congress of the United States; that said H. V. McChesney, defendant herein, and his successor in said office of Secretary of State, if he shall cease to be the incumbent of said office, be enjoined and restrained from certifying the names of said candidates for Congress in the Fourth Congressional District of Kentucky to the County Court Clerks of the counties of Green, Hart and Taylor, to be by such Clerks, printed upon the ballots to be used in said counties at said Congressional election to be held in November, 1908; that said defendant, McChesney and his said successor in said office be enjoined and
18 restrained from refusing to certify the names of the candidates of said parties certified to him as the nominees of the Republican and Democratic parties in the Eleventh Congressional District of Kentucky to the County Court Clerks of said counties of Green, Hart and Taylor, to be by said Clerks printed upon the ballots to be used in said counties at said Congressional election to be held in November, 1908, and that said defendant, McChesney and his successor in said office be required to certify to the County Court Clerks of said counties of Green, Hart and Taylor, the names of the candidates certified to him, said defendant, as Secretary of State, by the chairman and presiding officers and secretaries of the Republican and Democratic and other Congressional conventions Congressional committees, of the Eleventh Congressional District of Kentucky, to be by said Clerks printed upon the ballots to be used in said counties at said election; and plaintiff further prays that said defendant McChesney and his successor in said office be enjoined and

restrained from proceeding under or in accordance with said void and unconstitutional acts approved respectively May 26, 1890, March 12, 1898, and March 11, 1898, or from certifying to the various County Court Clerks of Kentucky the names of any nominees for said office of member of Congress according to said void and unconstitutional acts, and that he, said defendant, H. V. Mc-
19 Chesney and his successor in said office, be required to observe and proceed under and in conformity with said act of April 15, 1882, and to certify to the various County Court Clerks of Kentucky the names of the various nominees in the various districts of Kentucky of the Republican and Democratic and other parties therein, to be by said Clerks printed upon the ballots to be used in said counties at the Congressional election to be held in November, 1908, according as said counties are embraced in and constitute parts of the various eleven Congressional districts of Kentucky as constituted by and under said act of the General Assembly of the Commonwealth of Kentucky, approved April 15, 1882.

And plaintiff prays that said defendants, said Clerks of said County Courts of said Counties of Green, Hart and Taylor, be enjoined and restrained from printing or causing to be printed upon the ballots to be used in said counties at said election for member of Congress in November, 1908, the names of any person nominated for Congress by said Republican or Democratic party in said pretended and unlawful Fourth Congressional District of Kentucky, and from refusing or failing to print and cause to be printed upon said ballots so to be used in said counties at said election the names of the persons nominated for Congress in the Eleventh Congressional District of
20 Kentucky by said parties respectively as the nominees for Congress of said parties respectively *as the nominees for Congress of said parties respectively* to be voted for in said counties at said election in November, 1908. And plaintiff prays for all proper and general relief.

W. C. HALBERT,
WORTHINGTON & COCHRAN,
WM. H. HOLT,
GEORGE DU RELLE,
Att'ys for Plaintiff.

STATE OF KENTUCKY,
County of Hart, ss:

The plaintiff, Charles Richardson, says that he believes the statement of the foregoing petition are true and that no injunction herein has been heretofore refused by any court or circuit judge nor has any application been made to any court or officer to grant an injunction herein.

CHARLES RICHARDSON.

21 Subscribed and sworn to before me by Charles Richardson this 3rd day of January, 1907. My commission will expire, February 13, 1910.

H. F. MANSFIELD,
N. P., Hart County, Kentucky.

Endorsed as follows: Petition filed in office and summons and copy issued to Green County and summons and copy issued to Taylor County and summons and copy issued to Hart county and summons issued to Franklin County. This January 7th, 1907. Pilson Smith, Clerk Green Circuit Court.

22

Green Circuit Court.

CHARLES RICHARDSON, Plaintiff,

vs.

H. V. MCCHESNEY, Secretary of State, of the Commonwealth of Kentucky; P. F. MARSHALL, Clerk of the County Court of Green County, Kentucky; E. E. BIGGS, Clerk of the County Court of Hart County, Kentucky; S. E. KERR, Clerk of the County Court of Hart County, Kentucky, Defendants.

Demurrer.

The defendants, H. V. McChesney, Secretary of State of the Commonwealth of Kentucky, P. F. Marshall, Clerk of the County Court of Green County, Ky., E. E. Biggs, Clerk of the County Court of Hart County, Ky., and S. E. Kerr, Clerk of the County Court of Taylor county, Ky., come and demur to the plaintiff's petition herein;

1st. Because same does not state facts sufficient to constitute a cause of action, and,

2nd. Because same does not state facts sufficient to support a cause of action.

23

JEFF HENRY,
C. H. NOGGLE,
Att'ys for Defendants.

Endorsed as follows: Filed in office this February 4, 1907. Pilson Smith, Clerk.

Green Circuit Court. In Equity.

CHARLES RICHARDSON, Plaintiff,

vs.

H. V. MCCHESNEY, &c., Defendants.

Copy Order.

This day came defendants by Attys. and produced their demurrer to plaintiff's petition herein which is ordered filed in office.
This Feby. 4th, 1907.

PILSON SMITH,
Clerk Green Circuit Court.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

24 Green Circuit Court. In Equity.

9th Day, March Term, 27th Day, March, 1907.

CHARLES RICHARDSON, Plaintiff,
against
H. V. McCHESNEY "ET AL.," Defendants.

This day came plaintiff by Atty. and produced a map of the State of Kentucky, and by agreement same is ordered filed, and came defendants by Attys. and called up their general demurrer to plaintiff's petition herein, and this cause is now submitted on said demurrer.

I. H. THURMAN,
Judge, G. C. C.

25 Green Circuit Court. In Equity.

— Day, June Term, 27th Day, June, 1907.

CHARLES RICHARDSON, Plaintiff,
against
H. V. McCHESNEY, &c., Defendants.

This cause having been heretofore submitted upon the defendants demurrer to the plaintiff's petition, and the court being sufficiently advised it is ordered and adjudged that the demurrer to the petition be sustained, and the plaintiff declining to plead further, it is therefore ordered and adjudged by the court that the plaintiff's petition be dismissed, and that the defendants recover of the plaintiff their costs herein expended for which they may have execution, to all of which the plaintiff objects and excepts and prays an appeal to the Court of Appeals, which is granted according to law, and this case is now continued.

I. H. THURMAN,
Judge, G. C. C.

26 CHARLES RICHARDSON, Plaintiff,
vs.
H. V. McCHESNEY, &c., Defendants.

I, Pilson Smith, Clerk Green Circuit Court, hereby certify that the foregoing is a true, complete and correct copy of all the record in the above styled action; except the map of Kentucky filed herein, the original of which is by agreement made part hereof.

Given under my hand this July 10th, 1907.

PILSON SMITH,
Clerk Green Circuit Court.

27 And with said transcript there was filed an exhibit and which is as follows:

(Here follows map marked p. 28.)

29 And with said transcript the appellant filed a statement and which is in words and figures as follows, to-wit:

30 *Statement.*

Court of Appeals.

CHARLES RICHARDSON, Appellant,
vs.
H. V. McCHESNEY, Secretary of State, &c., Appellees.

A.—CHARLES RICHARDSON, Appellant,

B.—H. V. McCHESNEY, Secretary of State of the Com'lth of Ky.; P. F. MARSHALL, Clerk of the Green County Court; E. E. BIGGS, Clerk of the Hart County Court; S. E. KERR, Clerk of the Taylor County Court, Appellees.

C.—The judgment appealed from was rendered on June 27, 1907, and will be found on page — of this record.
D.—Appeal granted below—no summons necessary.

W. C. HALBERT,
WM. H. HOLT, &c.,
Att'ys for Appellant.

31 Be it remembered that at a Court of Appeals of Kentucky held at the Capitol at Frankfort, on the 16th day of October, 1907, the following order was entered, to-wit:

CHARLES RICHARDSON, Appellant,
vs.
H. V. McCHESNEY, Secretary of State, &c., Appellees.

Appeal from Green Circuit Court.

This case is ordered to be submitted.

And afterwards at a Court of Appeals of Kentucky held at the Capitol at Frankfort on the 11th day of March, 1908, the following judgment was entered, to-wit:

CHARLES RICHARDSON, Appellant,
vs.
H. V. McCHESNEY, Secretary of State, &c., Appellees.

Appeal from Green Circuit Court.

The Court being sufficiently advised it seems to them there is no error in the judgment herein. It is therefore considered that this judgment be affirmed, which is ordered certified to said Court.

It is further considered that the appellees recover of the
32 appellant their costs herein expended.

And on said date the Court delivered the following opinion:

33 Court of Appeals of Kentucky.

March 11, 1908.

(To be Reported.)

CHARLES RICHARDSON, Appellant,

vs.

H. V. MCCHESNEY, Secretary of State, Appellee.

Appeal from Green Circuit Court.

Opinion of the Court by Judge Carroll.

This suit was brought by appellant for the purpose of having declared invalid the act of 1890 and the acts of 1898 dividing the State into Congressional Districts.

In 1890 the General Assembly by an act approved May 26th, laid off the State into eleven Congressional districts. In 1898 by an act approved March 12th, the counties of Cumberland and Monroe were taken from the third Congressional district and added to the Eleventh district; and the county of Metcalfe was taken from the Eleventh Congressional district and added to the Third Congressional district.

By an act approved March 11th, 1898, the county of Jack-
34 son was transferred from the Eighth to the Eleventh Congressional district. The chief objection is to apportionment made under the act of 1890.

The ground upon which these acts were assailed is that the population of the districts is grossly unequal—the effect being to deny to the Republican party, who are the instigators of this suit, a fair and equal representation in the distribution of the State into Congressional districts. In short, the charge in effect is that the state was "gerrymandered" in the interest of the Democratic party.

The apportionment complained of was made under the census of 1880. The census of 1890 had not been completed when it was made. The population of the State under the census of 1880 was 1,648,690, which, divided by eleven would make the population of each district 149,881. The petition sets out that the population of the several districts in 1880 was as follows:

First District	149,740
Second "	152,960
Third "	156,658
Fourth "	188,124
Fifth "	146,010
Sixth "	144,160
Seventh "	130,003
Eighth "	128,656
Ninth "	164,085
Tenth "	114,024
Eleventh "	172,630

35 It will thus be seen that the population of the districts is not grossly unequal when compared with the apportionment but this question is not material in the disposition of the case, as we are of the opinion that it is not within the power of the courts to control the legislative department in the creation of Congressional districts. There is no mention of Congressional districts in the Constitution of the State; nor is there in that instrument any direction to the General Assembly as to how the districts shall be laid off. In the matter of dividing the State into Congressional districts the Legislature, at least so far as the power and authority of this court extends is supreme. This Court has no control over its action. It would be exceeding the power granted us to undertake to revise or annul a legislative act relating to a subject over which the Legislature has absolute control. Except when limited by the Constitution of the State, the General Assembly especially in administrative and political affairs is beyond the reach of the judiciary of the State. We have no authority to pass judgment upon its acts. In no case that has come under our notice have the courts undertaken to attempt to restrain the Legislative departments, unless it violated some provision of the organic law of the State. If, in the matter of dividing the State into Congressional districts this court should undertake
86 to declare invalid the division made by the legislative department, it would simply result in setting up our judgment against the judgment of the members elected for the purpose of performing this duty. We would be putting up our opinion against those in whom the exclusive right to regulate this matter has been lodged, and be arrogating to ourselves wisdom, honesty and fairness superior to those charged by law with the control of these matters. Moore *v.* City of Georgetown, 32 Ky. L. R., 323. When the Legislature has exceeded its legitimate powers by enacting laws in conflict with the Constitution, or that are prohibited by it, we have not hesitated to interpose the veto power lodged in the judiciary for the purpose of preserving the integrity of the organic law under which all departments of the State government were created and live and to which all of them owe obedience. And so when the General Assembly in the division of the State into Senatorial and Legislative districts grossly violated that provision of the Constitution directing that the districts should be "as nearly equal in population as may be," we exercised the power vested in the judiciary to protect from invasion by whatever source the fundamental law of the State, and declared the act invalid. Ragland *v.* Anderson, 30 Ky. L. R.,
37 1199. But, in the matter of Congressional districts, we find nothing in our State Constitution to guide us. There is nowhere any limitation upon the power of the legislature, and it would be assuming authority this Court does not possess if we undertook to control a coördinate department of the government in the performance of a power vested exclusively in it. It is not for the judiciary to question the policy, expediency or propriety of laws enacted by the General Assembly, unless they conflict with the Constitution. Judge Cooley in his work on Constitutional Limitations,

page 200, thus states with great force and clearness, the prevailing doctrine upon this subject:

"The moment a court ventures to substitute its own judgment for that of the Legislature, in any case where the Constitution has vested the Legislature with power over the subject, that moment it enters upon a field where it is impossible to set limits to its authority, and where its discretion alone will measure the extent of its interference. The rule of law upon this subject appears to be, that, except where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the State,
38 except as those rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fails, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the constitution. It cannot run a race of opinions upon points of right, reason and expediency with the lawmaking power. Any legislative act which does not encroach upon the power apportioned to the other departments, being *prima facie* valid, must be enforced, unless restrictions upon the legislative authority can be pointed out in the Constitution, and the case shown to come within them."

Nor do we find in the Constitution of the United States any direction to the States upon this subject. The only provisions in that instrument relating to it are these:

Sec. 4, art. 1, provides "the time, places and manner of holding elections for Senators and Representatives shall be prescribed
39 in each State by the Legislature thereof, but that Congress may at any time by law make or alter such regulations, except as to the place of choosing Senators."

And the Fourteenth Amendment provides:

"Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed."

It will thus be seen that the Constitution of the United States has left matters relating to Congressional districts to the disposition of the States. Nor has the Congress of the United States undertaken to legislate upon the subject, except to provide "that the number of Congressmen to which each state may be entitled in Congress shall be elected by districts composed of contiguous territory and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no one district electing more than one Representative." What right, if any, Congress has to control or supervise the action of State legislatures in the division of the States into Congressional districts, we need express no opinion in the absence of a judicial determination by the Supreme Court of

the United States of the power of Congress to control the States in this matter.

Wherefore the judgment of the lower court is affirmed.

40 W. C. Halbert, Wm. H. Holt, George DuRelle, E. L. Worthington, For Appellant.

C. H. Noggle, For Appellee.

41 And afterwards there was filed in the office of the Clerk of the Court of Appeals of Kentucky on the 12th day of June, 1908, an Assignment of Errors which is hereby attached and is as follows, to-wit:

42 Court of Appeals of Kentucky.

CHARLES RICHARDSON, Appellant,

vs.

H. V. McCHESNEY, Secretary of State, of the Commonwealth of Kentucky; P. F. MARSHALL, Clerk of the County Court of Green County, Kentucky; E. E. BIGGS, Clerk of the County Court of Hart County, Kentucky; and S. E. KERR, Clerk of the County Court of Taylor County, Kentucky, Appellees.

Assignment of Errors.

Plaintiff-in-error, Charles Richardson, feeling himself aggrieved by the findings and judgment of the Court of Appeals of Kentucky, in the above entitled cause, comes, by his attorneys, and assigns error thereto as follows, to-wit.

I. In holding and adjudging that the Statute passed by the General Assembly of the Commonwealth of Kentucky, approved May 26, 1890, entitled, "An Act to re-apportion the state into eleven Congressional districts" was not in conflict with or repugnant to Article 4, §4 of the Constitution of the United States in denying to the State of Kentucky a Republican form of Government; plaintiff-in-error in the above entitled cause specially set up and claimed, and now avers that said Statute of the State of Kentucky was and has always been in conflict with, and repugnant to said provision of said Constitution of the United States.

43 II. The Court of Appeals of Kentucky erred in deciding that the Statute of Kentucky, to-wit, the Act passed by the General Assembly of Kentucky on March 12, 1898, entitled, "An Act changing the boundaries of the third and eleventh Congressional districts" was not in conflict with or repugnant to Article 4, §4 of the Constitution of the United States, in denying to the State of Kentucky a Republican form of Government; plaintiff-in-error in the above entitled cause specially set up and claimed, and now avers that said Statute of the State of Kentucky was and has always been in conflict with, and repugnant to the provision of said Constitution of the United States.

III. The Court of Appeals of Kentucky erred in deciding that the Statute of Kentucky, to-wit, the Act passed by the General Assembly

of Kentucky, on March 11, 1898, entitled, "An Act to change the boundaries of the eighth and eleventh Congressional districts" was not on conflict with or repugnant to Article 4, §4 of the Constitution of the United States, in denying to the State of Kentucky a Republican form of Government; plaintiff-in-error in the above entitled cause specially set up and claimed, and now avers that said Statute of the State of Kentucky was and has always been in conflict with, and repugnant to the provision of said Constitution of the United States.

IV. The Court of Appeals of Kentucky erred in deciding that the Statute of Kentucky, to-wit, the Act passed by the General Assembly of Kentucky on May 26, 1890, entitled, "An — to re-apportion the state into eleven Congressional districts" was not in conflict with or repugnant to the Act of Congress approved February 25,
44 1882, entitled, "An Act making an apportionment of representatives in Congress among the several states under the tenth census," providing that in each state the number of representatives to which such state may be entitled in the Forty-eighth and each subsequent Congress shall be elected by districts composed of contiguous territory, and containing as nearly as practicable an equal number of inhabitants; plaintiff-in-error in the above entitled cause specially set up and claimed, and now avers that said statute of the State of Kentucky was and has always been in conflict with and repugnant to the said provision of said Statute of the United States.

V. The Court of Appeals of Kentucky erred in deciding that the statute of Kentucky, to-wit, the Act passed by the General Assembly of Kentucky on May 26, 1890, entitled, "An Act to re-apportion the state into eleven congressional districts," was not in conflict with or repugnant to the Act of Congress approved February 7, 1891, entitled, "An Act making an apportionment of representatives in Congress among the several states under the eleventh census," providing that in each state the number of representatives to which such state may be entitled in the Fifty-third and each subsequent Congress shall be elected by districts composed of contiguous territory, and containing as nearly as practicable an equal number of inhabitants; plaintiff-in-error in the above entitled cause specially set up and claimed, and now avers that said statute of the State of Kentucky was and has always been in conflict with, and repugnant to the said provision of said Statute of the United States.

45 VI. The Court of Appeals of Kentucky erred in deciding that the Statute of Kentucky, to-wit, the Act passed by the General Assembly of Kentucky on May 26, 1890, entitled, "An Act to reapportion the state into eleven congressional districts," was not in conflict with or repugnant to the Act of Congress approved January 16, 1901, entitled, "An Act making an apportionment of representatives in Congress among the several states under the twelfth census," providing that in each state the number of representatives to which such state may be entitled in the Fifty-eighth and each subsequent Congress shall be elected by districts composed of contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants; plaintiff-in-error in the above en-

titled cause specially set up and claimed, and now avers that said statute of the State of Kentucky was and has always been in conflict with and repugnant to the said provision of said Statute of the United States.

VII. The Court of Appeals erred in deciding that the Statute of Kentucky, to-wit, the Act passed by the General Assembly of Kentucky on March 12, 1898, entitled, "An Act changing the boundaries of the third and eleventh Congressional districts," was not in conflict with or repugnant to the Act of Congress approved February 7, 1891, entitled, "An Act making an apportionment of representatives in Congress among the several states under the eleventh census," providing that in each state the number of representatives to which such state may be entitled in the Fifty-third and each subsequent Congress shall be elected by districts composed of contoguous
46 territory, and containing as nearly as practicable an equal number of inhabitants; plaintiff-in-error in the above entitled cause specially set up and claimed, and now avers that said statute of the State of Kentucky was and has always been in conflict with, and repugnant to, the said provision of said Statute of the United States.

VIII. The Court of Appeals of Kentucky erred in deciding that the Statute of Kentucky, to-wit, the Act passed by the General Assembly of Kentucky on March 12, 1898, entitled, "An Act changing the boundaries of the third and eleventh Congressional districts," was not in conflict with or repugnant to the Act of Congress approved January 16, 1901, entitled, "An Act making an apportionment of representatives in Congress among the several states under the twelfth census," providing that in each state the number of representatives to which such state may be entitled in the Fifty-eighth and each subsequent Congress shall be elected by districts composed of contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants; plaintiff-in-error in the above entitled cause specially set up and claimed, and now avers that said Statute of the State of Kentucky was and has always been in conflict with and repugnant to the said provision of said Statute of the United States.

IX. The Court of Appeals of Kentucky erred in holding that the Statute of Kentucky, to-wit, the Act passed by the General Assembly of Kentucky on March 11, 1898, entitled, "An Act to change the boundaries of the eighth and eleventh Congressional dis-
47 tricts," was not in conflict with or repugnant to the Act of Congress approved February 7, 1891, entitled, "An Act making an apportionment of representatives in Congress among the several states under the eleventh census," providing that in each state the number of representatives to which such state may be entitled in the Fifty-third and each subsequent Congress shall be elected by districts composed of contiguous territory, and containing as nearly as practicable an equal number of inhabitants; plaintiff-in-error in the above entitled cause specially set up and claimed, and now avers that said Statute of the State of Kentucky was and has

always been in conflict with and repugnant to the said provision of said statute of the United States.

X. The Court of Appeals of Kentucky erred in deciding that the Statute of Kentucky, to-wit, the Act passed by the General Assembly of Kentucky on March 11, 1898, entitled, "An Act to change the boundaries of the eighth and eleventh Congressional districts," was not in conflict with or repugnant to the Act of Congress approved January 16, 1901, entitled, "An Act making an apportionment of representatives in Congress among the several states under the twelfth census," providing that in each state the number of representatives to which such state may be entitled in the Fifty-eighth and each subsequent Congress shall be elected by districts composed of contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants; plaintiff-in-error in the above entitled cause specially set up and claimed, and now avers that said Statute of the State of Kentucky was and has always been
48 in conflict with and repugnant to the said provision of said Statute of the United States.

XI. The Court of Appeals of Kentucky erred in holding and adjudging that in dividing the State of Kentucky into Congressional districts, the Legislature of Kentucky is supreme, so far as the power and authority of said Court extends, and that said Court has no control over the action of said Legislature in that behalf.

XII. The Court of Appeals of Kentucky erred in deciding and adjudging that it, said Court, was without power to declare void a legislative act relating to the division of said State into Congressional districts and was without authority to pass judgment upon the validity of such an act.

XIII. The Court of Appeals of Kentucky erred in holding that the plaintiff-in-error was not entitled to the injunction which he prayed, and in not holding that said Statutes of Kentucky were illegal and void, and in conflict with the Constitution and Statutes of the United States, and because they denied to plaintiff-in-error the right and privilege conferred upon him by said Constitution.

W. C. HALBERT,
E. L. WORTHINGTON,
W. H. HOLT,
GEORGE DU RELLE,
Counsel for Plaintiff-in-Error.

Filed Jun- 12, 1908.
NAPIER ADAMS, *C. C. A.*

Filed June 11th, 1908.
ED. C. O'REAR,
Chief Justice Court of Appeals of Kentucky.

49 And on said date there was filed in the office of the Clerk of the Court of Appeals of Kentucky a petition for Writ of Error, and which is attached hereto, and is as follows, to-wit:

50 Court of Appeals of Kentucky.

CHARLES RICHARDSON, Appellant,

vs.

H. V. MCCHESNEY, Secretary of State, of the Commonwealth of Kentucky; P. F. MARSHALL, Clerk of the County Court of Green County, Kentucky; E. E. BIGGS, Clerk of the County Court of Hart County, Kentucky; and R. E. KERR, Clerk of the County Court of Taylor County, Kentucky, Appellees.

Petition for Writ of Error.

The above named Charles Richardson, conceiving himself aggrieved by the decision made and judgment rendered by the Court of Appeals of Kentucky, in the cause of the above named appellant and plaintiff-in-error against the above named appellees and defendants-in-error in said Court, at its January Term, 1908, to-wit, on the 11th day of March, A. D. 1908, said Court being the highest Court of the State of Kentucky and the Court of last resort for the hearing and determination of said cause, in which cause was drawn in question the validity of three Statutes of the State of Kentucky, to-wit, an Act of the General Assembly of the Commonwealth of Kentucky, approved May 26, 1890, entitled, "An Act to re-apportion the state into eleven Congressional Districts," and an act of said General Assembly of the Commonwealth of Kentucky, passed March 12, 1898,
51 entitled, "An Act changing the boundaries of the third and eleventh Congressional Districts," and an Act of said General Assembly of the Commonwealth of Kentucky, passed March 11, 1898, and entitled, "An Act to change the boundaries of the eighth and eleventh Congressional Districts of Kentucky," upon the ground that each of said Acts was repugnant to the Constitution of the United States and the decision of said Court of Appeals was in favor of the validity of each of said Statutes, and in which cause was drawn in question the construction of a clause of the Constitution of the United States, and the decision of said Court of Appeals was against the right and privilege specially set up and claimed by said plaintiff-in-error under said clause of said Constitution, said right so specially claimed and set up, being the right of the plaintiff-in-error as a citizen of the United States to have a Republican form of Government in the Commonwealth of Kentucky, and to equal rights with other citizens in the election of members of the Congress of the United States from said state, and to equal representation with other citizens of the United States in the Congress of the United States, and in which said cause was drawn in question the construction of a Statute of the United States, to-wit, the Act of Congress approved February 25, 1882, entitled, "An Act making an apportionment of representatives in Congress among the several states under the tenth census," and the construction of a Statute of

the United States, to-wit, the Act of Congress approved Feb-
52 ruary 7, 1891, entitled, "An Act making an apportionment of representatives in Congress among the several states under the eleventh census," and the construction of a Statute of the United States, to-wit, the Act of Congress approved January 16, 1901, entitled, "An Act making an apportionment of representatives in Congress among the several states under the twelfth census," and the decision of said Court of Appeals was against the rights specially set up and claimed under said Statutes of the United States by said plaintiff-in-error, the said rights so specially claimed and set up being the right of plaintiff-in-error as a citizen of the United States to vote for member of Congress in a Congressional District, composed of contiguous and compact territory, and containing as nearly as practicable a number of inhabitants equal to the number of inhabitants of the other Congressional Districts of Kentucky, and the right and privilege of plaintiff-in-error as a citizen of the United States and of Hart County, Kentucky, to have the names of candidates nominated for Congress in the eleventh Congressional District of Kentucky, certified by the Secretary of State of Kentucky, to the County Court Clerk of Hart County, Kentucky, and placed upon the ballots to be used in said Hart County, at the election to be held therein in November, 1908, each of which rights and privileges was denied as aforesaid by said Court of Appeals of Kentucky by virtue of said Statutes of Kentucky;

Presents herewith its assignment of errors, and prays for a writ of error to issue out of the Supreme Court of the United States to said Court of Appeals of Kentucky, to the end that the record
53 in said matter may be removed to said Supreme Court of the United States, and the errors complained of by plaintiff-in-error may be examined and corrected, and the judgment aforesaid of said Court of Appeals of Kentucky be reviewed and reversed.

W. C. HALBERT,
E. L. WORTHINGTON,
W. H. HOLT,
GEORGE DU RELLE,
Counsel for Plaintiff-in-Error.

Filed June 11, 1908.

ED. C. O'REAR,
Chief Justice, Court of Appeals of Kentucky.

Filed Jun- 12, 1908.

NAPIER ADAMS, *C. C. A.*

54 And on said date there was filed in the office of the Clerk of the Court of Appeals of Kentucky a Writ of Error from the Supreme Court of the United States to the Court of Appeals of Kentucky and the allowance thereof by the Chief Justice of the Court of Appeals and which is hereto attached and is as follows:

55 UNITED STATES OF AMERICA,
Eastern District of Kentucky, Sixth Judicial Circuit, ss:

The President of the United States to the Honorable Judges of the Court of Appeals of the Commonwealth of Kentucky, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said Court of Appeals of the Commonwealth of Kentucky, before you or some of you, being the highest Court of law or equity of the said State of Kentucky in which a decision could be had in the said suit, between Charles Richardson, plaintiff and appellant, and plaintiff-in-error, and H. V. McChesney, Secretary of State of the Commonwealth of Kentucky, P. F. Marshall, Clerk of the County Court of Green County, Kentucky, E. E. Biggs, Clerk of the County Court of Hart County, Kentucky, and S. E. Kerr, Clerk of the County Court of Taylor County, Kentucky, defendants and appellees, and defendants-in-error, wherein was drawn in question the validity of three statutes of said State of Kentucky, on the ground of their being repugnant to the constitution and laws of the United States, and the decision was in favor of such their validity, and wherein was drawn in question the construction of a clause of the constitution of the United States, and the decision was against the right and privilege specially set up and claimed under such clause of said constitution, and wherein was drawn in question the construction of three statutes of the United States, and the decision was against the right
56 and privilege specially set up and claimed under such clause of the said statute, a manifest error hath happened, to the great damage of the said Charles Richardson, plaintiff-in-error, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 10 day of July next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 11th day of June, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the United States of America the one hundred and thirty-second.

[Seal 6th Circuit Court, Eastern Ky. Dis., U. S. of America.]

CHAS. N. WIARD,
Clerk of the Circuit Court of the United States, for the Eastern District of Kentucky, at Frankfort.

Allowed by
ED. C. O'REAR,
Chief Justice, Court of Appeals of Kentucky.

(Endorsed:) Filed Jun- 12, 1908. Napier Adams, C. C. A.

57 And on said date there was filed in the office of the Clerk of the Court of Appeals of Kentucky a Writ of Error Bond together with the Power of Attorney from Charles Richardson to George Du Rell and which are in words and figures as follows, to-wit:

58 Court of Appeals of Kentucky.

CHARLES RICHARDSON, Appellant,

vs.

H. V. McCHESNEY, Secretary of State, of the Commonwealth of Kentucky; P. F. MARSHALL, Clerk of the County Court of Green County, Kentucky; E. E. BIGGS, Clerk of the County Court of Hart County, Kentucky; and S. E. KERR, Clerk of the County Court of Taylor County, Kentucky, Appellees.

Know all men by these presents, That we, Charles Richardson, as principal, and C. C. McClarty as surety, are held and firmly bound unto H. V. McChesney, P. F. Marshall, E. E. Biggs and S. E. Kerr, defendants and appellees above named, in the full and just sum of Five Hundred Dollars ($500.00) to be paid to the said defendants and appellees, their executors or administrators, to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our and each of our successors, representatives and assigns firmly by these presents.

Sealed with our seals and dated the 11th day of June, 1908.

Whereas, lately, at a session of said Court of Appeals of
59 Kentucky in a suit pending in said court between Charles Richardson, plaintiff and appellant, and H. V. McChesney, Secretary of State of the Commonwealth of Kentucky, P. F. Marshall, Clerk of the County Court of Green County, Kentucky, E. E. Biggs, Clerk of the County Court of Hart County, Kentucky, and S. E. Kerr, Clerk of the County Court of Taylor County, Kentucky, defendants and appellees, a final judgment was rendered against said plaintiff and appellant, and the said Charles Richardson, plaintiff and appellant has sued out a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to said H. V. McChesney, P. F. Marshall, E. E. Biggs and S. E. Kerr is about to be issued, citing and admonishing them and each of them to be and appear at a session of the Supreme Court of the United States, to be holden at Washington.

Now, the condition of the above obligation is such that if the said Charles Richardson shall prosecute his writ of error to effect, and shall answer all costs that may be awarded against him, if he fails to make his plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

CHARLES RICHARDSON,
By GEORGE DU RELL,
Attorney in Fact.
C. C. McCLARTY.

60 Examined and approved,
ED. C. O'REAR,
Chief Justice of the Court of Appeals of Kentucky.

Filed June 12, 1908.
NAPIER ADAMS, *C. C. A.*

61 STATE OF KENTUCKY,
County of Jefferson, set:

Personally appeared before me this 11th day of June, A. D., 1908, the above named C. C. McClarty, to me personally known, and acknowledged the foregoing instrument to be his act and deed.
My commission expires ——.

JNO. J. FLYNN,
Notary Public, Jefferson Co., Ky.,
Notary Public, Jefferson Co.

My commission Expires Mar. 11th, 1910.

62 STATE OF KENTUCKY,
County of Jefferson, set:

The undersigned, C. C. McClarty, being duly sworn, states that he is the owner of property in the State of Kentucky subject to execution over and above his debts and exemptions allowed by law to the amount of One Thousand Dollars. ($1000.00)

C. C. McCLARTY.

Subscribed and sworn to before me by C. C. McClarty, this 11th day of June, 1908. My commission as a Notary Public expires ——.
[SEAL.]

JOHN J. FLYNN,
Notary Public, Jefferson Co., Ky.,
Notary Public, Jefferson Co.

My Commission expires Mar. 11th, 1910.

Filed June 12, 1908.
NAPIER ADAMS, *C. C. A.*

63 STATE OF KENTUCKY,
County of Hart, set:

I, Charles Richardson, hereby constitute and appoint George Du Rell my true and lawful attorney, for me and in my name and stead, to execute any bond not exceeding the sum of Five Hundred Dollars, required by the Chief Justice of the Court of Appeals of Kentucky, or the acting Chief Justice thereof, upon issuing a citation to the defendants-in-error in a writ of error to be issued to reverse and correct the judgment and decision of said Court of Appeals of Kentucky, in a suit between me as plaintiff and appellant and H. V. McChesney, Secretary of State of the Commonwealth of Kentucky, P. F. Marshall, Clerk of the County Court of Green County, Kentucky, E. E. Biggs, Clerk of the County Court of Hart County, Kentucky, and S. E. Kerr, Clerk of the County Court of Taylor County, Kentucky, as defendants and appellees, lately, to-wit, on March 11, 1908, decided in said Court of Appeals, said bond to be conditioned that if I shall prosecute said writ of error to effect, and shall answer all costs that may be awarded against me, if I fail

to make my plea good, then said obligation is to be void, otherwise to remain in full force and virtue.

64 CHARLES RICHARDSON.

STATE OF KENTUCKY,
County of Hart:

Personally appeared before me Charles Richardson, to me personally known, who acknowledged the foregoing instrument to be his act and deed. My commission expires.

[SEAL.] J. M. CRADDOCK,
Notary Public, Hart County, Ky.

June 11, 1908.

My commission expires March, 1912.

65 And on the — day of —— there was filed in the office of the Clerk of the Court of Appeals of Kentucky the Original Citation with the approval of sureties endorsed thereon and which is attached hereto and which is as follows, to-wit:

66 UNITED STATES OF AMERICA, *sct:*

The President of the United States to H. V. McChesney, Secretary of State of the Commonwealth of Kentucky, P. F. Marshall, Clerk of the County Court of Green County, Kentucky, E. E. Biggs, Clerk of the County Court of Hart County, Kentucky, and R. E. Kerr, Clerk of the County Court of Taylor County, Kentucky, Greeting:

You are hereby cited and admonished to appear at the Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the Court of Appeals of Kentucky, which court is the Supreme Court of said State, wherein Charles Richardson is plaintiff-in-error, and you are the defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff-in-error, as in the said writ of error mentioned, ought not to be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 11th day of June, A. D. 1908 and of the Independence of the United States the One hundred and thirty-second.

ED. C. O'REAR,
Chief Justice, Court of Appeals of Ky.

Attest:
NAPIER ADAMS, *Clerk.*

A copy of the foregoing citation has been served upon *me* this 16th day of June, A. D. 1908.

JEFF. HENY,
C. H. NOGGLE,
Counsel for Defendants-in-Error.

Filed June 30th, 1908.
NAPIER ADAMS, *Clerk C. A.*

67 COMMONWEALTH OF KENTUCKY,
Court of Appeals, sct:

In obedience to the commands of the within attached Writ of Error, I hereby transmit to the Supreme Court of the United States a complete transcript of the entire record with all things concerning the same as same appears from the records on file in my office.

In Testimony Whereof I have hereunto subscribed my name and attached my official seal. Done at the Capitol at Frankfort, Kentucky, on this the 30th Day of June, A. D., 1908.

[Seal Kentucky Court of Appeals.]

NAPIER ADAMS,
Clerk Court of Appeals of Kentucky.

Endorsed on cover: File No. 21,252. Kentucky court of appeals. Term No. 456. Charles Richardson, plaintiff in error, *vs.* H. V. McChesney, secretary of state of the Commonwealth of Kentucky, *et al.* Filed July 6th, 1908. File No. 21,252.

No. 23

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

CHARLES RICHARDSON, - - - *Plaintiff in Error,*

versus

H. V. McCHESNEY, Secretary of State of the Commonwealth of Kentucky, et al., - *Defendant in Error.*

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

BRIEF FOR PLAINTIFF IN ERROR.

WILLIAM H. HOLT,
GEORGE DuRELLE,
Attorneys for Plaintiff in Error.

W. C. HALBERT,
E. L. WORTHINGTON,
W. D. COCHRAN,
Of Counsel.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 456.

CHARLES RICHARDSON, - - - *Plaintiff in Error,*

versus

H. V. MCCHESNEY, SECRETARY OF STATE OF THE COMMONWEALTH OF KENTUCKY, ET AL., - - - - - - - - *Defendant in Error.*

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

BRIEF FOR PLAINTIFF IN ERROR.

May it please the Court:

On the 7th of January, 1907, the plaintiff in error brought this suit in equity in the Circuit Court of Green County, Kentucky, against the Secretary of State of Kentucky and the clerks of the county courts of the counties of Green, Hart and Taylor to enjoin the Secretary of State and his successor in office from certifying and the clerks from printing on the ballots the names

of the congressional nominees of the various political parties in accordance with the Congressional Apportionment Act of the Kentucky General Assembly, approved May 26, 1890, and the two acts amendatory thereof, approved respectively March 11 and 12, 1898, and to declare those acts unconstitutional and void under the Constitution of the United States and the Constitution of Kentucky, and void as repugnant to the acts of Congress which require the election of Congressmen to be by districts composed of contiguous territory and containing as nearly as practicable an equal number of inhabitants, and as repugnant also the subsequent act of Congress requiring such elections to be by districts composed of contiguous *and compact* territory and containing as nearly as possible an equal number of inhabitants.

The petition in equity (Record, pp. 1-9) sets forth that plaintiff is a citizen, elector, voter and taxpayer of the county of Hart and State of Kentucky, born in the United States and subject to the jurisdiction thereof, a citizen of the United States over twenty-four years old, and for more than two years and still a resident and citizen of Hart County, Kentucky, having all the qualifications requisite for electors of the most numerous branch of the State Legislature of Kentucky, and qualified and entitled to vote for member of the Kentucky House of Representatives from the representative district in which Hart County is situated, and for member of Congress from the congressional district in which that county is situated (R. p. 1); that his right to vote in such congressional election is a privilege belonging to

him as a citizen of the United States and guaranteed to him by the United States and Kentucky Constitutions. The petition pleads the acts of Congress of February 25, 1882, and February 7, 1891, making apportionment of representatives in Congress among the several States under the tenth and eleventh censuses, respectively, and each requiring the number of representatives in Congress to which each State may be entitled (Kentucky being entitled to eleven) to be elected by districts composed of contiguous territory, and containing as nearly as practicable an equal number of inhabitants, and also the Act of January 16, 1901, under the twelfth census, containing the same provision and requiring also that such districts should be composed of contiguous *and compact* territory (R. p. 2). It pleads the Kentucky Act of April 15, 1882, apportioning the State into eleven congressional districts (R. p. 3), and alleges the succeeding Kentucky Act of May 26, 1890 (the principal act attacked), and the two amendatory acts of March, 1898, which are also attacked, transferring certain counties from and to certain of the congressional districts (R. pp. 3, 4) and states the population of Kentucky, the average population of the congressional districts and the population of each in fact and according to the United States census taken in 1880, in 1890 and in 1900 (R. pp. 4-6). It alleges that the State of Kentucky can be divided into eleven congressional districts of contiguous *and compact* territory, and each approximately and reasonably equal in the number of inhabitants thereof, and that the three acts attacked are in violation of the pro-

vision of the Federal Constitution, guaranteeing to every State a republican form of government, in violation of various provisions of the Kentucky Constitution, and in violation of and repugnant to the acts of Congress above referred to, and that the congressional districts created by those acts of the Kentucky General Assembly do not contain as nearly as practicable an equal number of inhabitants, but utterly ignore the principle of equality (R. p. 6).

A table is given showing the excess and deficit in population of each district created by those acts according to the census of 1890 and that of 1900 (R. p. 6) and, from the facts stated, a table can be readily constructed according to the census of 1880 showing like discrepancies. The table given shows that according to the census of 1890 and, in fact, the populations of the congressional districts, created by the acts attacked vary from an extreme deficit below the average of..... 34,456
to an extreme excess above the average of..... 44,314
that is, a total difference of population in the extreme case of..... 78,770
with an average population per congressional district of 168,966
that is to say, that a voter in the eighth, the smallest district in population under the census of 1890, counted for more than one and one-half times as much as one in the eleventh district. According to the census of 1900, the extreme deficit was..... 51,989
and the extreme excess..... 62,484
that is, a total difference in the extreme case of..114,493

with an average population of.....195,197
so that a voter in the eighth district availed in voting more than one and four-fifths times as much as a voter in the eleventh. The figures given in the petition from the census of 1880 show the smallest district, the tenth, to have had a population of.....114,024
and the largest, the fourth, to have had a population of 188,124
a difference of..... 74,100
in population, so that a voter in the tenth district exercised more than one and three-fifths times as much power as a voter in the fourth. A discrepancy almost as great is shown between the eighth district with.....128,656
population or the seventh district with.....130,003
and the eleventh with.....172,630

Before the passage of the Kentucky Apportionment Act of May 26, 1890, the counties of Green, Hart and Taylor were in the eleventh district. By that act they were placed in the fourth district. By the Act of March 12, 1898, the counties of Cumberland and Monroe were taken from the third district and added to the already top-heavy eleventh, and the little county of Metcalfe was taken from the eleventh and added to the third. By the Act of March 11, 1898, the county of Jackson was taken from the eighth district, already far below the average, and added to the eleventh, already far above it (R. p. 6). The petition continues with apt averments as to the official action to be taken by the Secretary of State and his successor in office, and by the various clerks of the three counties named, unless restrained by injunc-

tion, namely, that they would proceed to certify and print the names of the candidates upon the ballots to be used in the various counties and districts in accordance with the invalid Apportionment Act of May 26, 1890, and the two acts amendatory thereof, and concludes with the prayer for injunctive relief and for all general and proper relief.

A demurrer was filed to the petition in equity. The trial court sustained the demurrer. The plaintiff in error declined to plead further and the petition was dismissed (R. p. 11). In deciding the demurrer the trial court stated from the bench that the division of the State into districts was grossly unfair, but that Congress had no power to restrict the States as to the allottment or mode of selecting Congressmen, but that matter was entirely with the State. An appeal was taken to the Court of Appeals of Kentucky and the judgment affirmed, the court delivering an opinion (R. pp. 13-16). That court based its decision in favor of the validity of the act attacked upon the proposition that the State Constitution contained no provision upon the subject; that the Federal Constitution left matters relating to the districts to the decision of the States, and questioned, though it did not decide upon, the power of Congress to control the States in the matter. An assignment of errors was filed (R. pp. 16-19) and writ of error sued out from this court (R. pp. 20, 21).

ARGUMENT.

I.

THE FEDERAL QUESTION AND THE DUTY OF THE STATE COURTS.

> "A final judgment or decree in any suit in the highest court of any State, in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute of * * * any state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity, or where any title, right, privilege or immunity is claimed under the Constiution, * * * or any * * * statute of * * * the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed, by either party, under such Constitution, * * * statute, * * * or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error." R. S. 700, as amended Feb. 18, 1875, 18 Stat. 318.

The Court of Appeals of Kentucky is the Supreme Court of Kentucky. (Ky. Constitution, Section 109.) The validity of the Kentucky statute of May 26, 1890, was distinctly drawn in question on the ground that it is repugnant to the Constitution of the United States, guaranteeing to each State a republican form of government, and on the ground that it is repugnant to the law of the United States which requires members of Congress to be elected by districts composed of contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants, and the decision of that

court was in favor of the validity of the statute. The right and privilege to vote for members of Congress in a district containing as nearly as practicable an equal number of inhabitants with that of the several districts of the State was specially set up and claimed by plaintiff in error, and the decision of the highest court of the State was against that right and privilege. The judgment rendered could not have been given without deciding in favor of the validity of the Kentucky statute and against the right and privilege claimed by plaintiff in error.

> "Where the Federal question is distinctly set up in the bill and insisted on at every stage, and the State court could not have decided as it did without overruling the claim, this court has jurisdiction." Otis Co. v. Ludlow Co., 201 U. S. 140.

The Court of Appeals seems to have misconceived the extent of its powers and duties.

The State court decided the demurrer in the absence of counsel for plaintiff in error. As we are informed, it stated, when the decision was rendered, that the apportionment was grossly unfair, but that Congress had no power to restrict the States as to the allotment or mode of selecting Congressmen, and that matter was entirely with the State.

The Court of Appeals in its opinion begins by stating that the census of 1890 had not been completed when the State Act of 1890 was passed, and that act was passed under the census of 1880, and copies from the petition the statement of the population of the various congres-

sional districts created by the Act of 1890, according to the census of 1880, in order to show that the division attempted by that act is not "grossly unequal." But the statement of the population of the districts copied in the opinion shows that the largest district had 188,124 and the smallest 114,024, a difference of 74,100, or a proportion of one to more than one and three-fifths. According to the census of 1890, the proportion was one to more than one and one-half, and by that of 1900, one to more than one and four-fifths.

But, the court continued:

> "This question is not material in the disposition of the case, as we are of the opinion that it is not within the power of the courts to control the legislative department in the creation of congressional districts. There is no mention of congressional districts in the Constitution of the State; nor is there in that instrument any direction to the General Assembly as to how the districts shall be laid off. In the matter of dividing the State into congressional districts the Legislature, at least so far as the power and authority of this court extends is supreme. This court has no control over its action. It would be exceeding the power granted us to undertake to revise or annul a legislative act relating to a subject over which the Legislature has absolute control. *Except when limited by the Constitution of the State,* the General Assembly especially in administrative and political affairs is beyond the reach of the judiciary of the State. We have no authority to pass judgment upon its acts. In no case that has come under our notice have the courts undertaken to attempt to restrain the legislative departments, *unless it violated some provision of the organic law of the State.* * * * But in the matter of congressional

districts, we find nothing in our State Constitution to guide us. There is nowhere any limitation upon the power of the Legislature, and it would be assuming authority this court does not possess if we undertook to control a co-ordinate department of the government in the performance of a power vested exclusively in it. It is not for the judiciary to question the policy, expediency or propriety of laws enacted by the General Assembly, unless they conflict with the Constitution."

This means, and in fact says, that the courts of the State have no power to declare a legislative act invalid unless it be forbidden by the *State* Constitution, and that those courts can not hold an act invalid as repugnant to the Federal Constitution or to the laws passed in pursuance thereto. As to this, it may be said that the Federal Constitution is at variance with this opinion of the Court of Appeals. It provides "that this Constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or the laws of any State to the contrary notwithstanding." Constitution, Art. VI. The Court of Appeals was at variance with this opinion when, in Blair v. Williams, 4 Litt. 34, and in Lapsley v. Brashears, 4 Litt. 47, it held the State law of Kentucky invalid under the Federal Constitution as impairing the obligation of contracts, and those decisions were rendered at a time when it was openly threatened that the court would be legislated out of office in the event of such a decision, when the attempt was actually made, because of this decision, to so legislate, and

when the State forgot all party ties and divided into "old and new court parties," striving for supremacy with a bitterness and ferocity not equaled even during the strife of the Civil War.

That court in Griswold v. Hapburn, 2 Duv. 20, held an act of Congress void as in violation of the Federal Constitution, and its decision was at first affirmed by this court, but afterwards decided the other way.

Now, it is immaterial, so far as this court's power of review is concerned, whether the Court of Appeals held that the act assailed was not repugnant to the Federal Constitution or the acts of Congress, or whether it held that it had no power to decide the question, or whether it held, as it intimates, that Congress had no power to legislate as to the manner in which representatives in Congress should be chosen by districts. Whichever theory was the basis of the court's opinion, it was equally a decision in favor of the validity of the law, and against the right and privilege specially set up and claimed by plaintiff in error.

In Dale v. Hyatt, 125 U. S. 46, this court held, in an opinion by Mr. Justice Gray, that the judgment of the State court holding that the question of the validity of the re-issue of a patent could not be contested in the action before it, and assuming jurisdiction to render judgment against the defendant, "necessarily involved a decision against the immunity claimed by the defendant under the Constitution and laws of the United States, which this court has jurisdiction to review."

But the Court of Appeals was in error as to its power and duty when it said that, except when limited by the Constitution *of the State*, the General Assembly was beyond the reach of the judiciary of the State. This court has determined this question in Claflin v. Houseman, 93 U. S. 130, where Mr. Justice Bradley said:

> "The fact that a State court derives its existence and functions from the State laws is no reason why it should not afford relief, because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the State laws."

In Cooley's Principles of Constitutional Law, pp. 32, 33, it is said:

> "A State law must yield to the supreme law, whether expressed in the Constitution of the United States or in any of its laws or treaties, so far as they come in collision, and whether it be a law in existence when the 'supreme law' was adopted or enacted afterwards. The same is true of any provision in the Constitution of any State which is found to be repugnant to the Constitution of the Union. And not only must 'the judges in every State' be bound by such supreme law, but so must the State itself, and every official in all its departments and every citizen."

In Robb v. Connelly, 111 U. S. 637, Mr. Justice Harlan said:

> "A State court of original jurisdiction, having the parties before it, may, consistently with existing Federal legislation, determine cases at law or in equity arising under the Constitution and laws of the United States or involving rights dependent upon such Constitution or laws."

And again in the same opinion:

> "Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States *and the laws made in pursuance thereof* wherever those rights are involved in any suit or proceeding before them, for the judges of the State courts are required to take an oath to support that Constitution, and they are bound by it and the laws of the United States made in pursuance thereof, and all treaties made under their authority, as the supreme law of the land, 'anything in the constitution or laws of any State to the contrary notwithstanding.' If they fail therein, and withhold or deny rights or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the State in which the question could be decided to this court for final and conclusive determination."

See also:

Teal v. Fulton, 53 U. S. 292.
The Moses Taylor, 4 Wall. 428.
Martin v. Hunter, 1 Wheat. 334.
Ex parte McNeil, 13 Wall. 236.
Murray v. Chicago & N. W. R'y Co., 62 Fed. 24.
Ex parte Siebold, 100 U. S. 371.

The Constitution provides that the times, places and manner of holding elections for representatives shall be prescribed in each State by the Legislature thereof, but the Congress may at any time make or alter such regulations. The Congress has acted upon this question, under this power, and has made regulations as to the places and manner of holding elections for representatives by

stating that they shall be elected by districts composed of contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants. Nevertheless the Court of Appeals questions the right of Congress to thus determine the places and manner of holding congressional elections and passes the question up to this court in these words:

> "What right, if any, Congress has to control or supervise the action of State legislatures in the division of the States into congressional districts, we need express no opinion, in the absence of a judicial determination by the Supreme Court of the United States of the power of Congress to control the States in this matter."

II.

THE KENTUCKY ACT IS REPUGNANT TO THE FEDERAL CONSTITUTION AND THE ACT OF CONGRESS.

The Kentucky act is repugnant to the Federal Constitution.

> "Representatives and direct taxes shall be apportioned among the several States which may be included within this Union according to their respective numbers, * * *." Constitution, Art. 1, Sec. 2, Clause 3.
>
> "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, including Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-president of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or members of the Legis-

lature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." Fourteenth Amendment, Sec. 2.

These provisions necessarily imply equality. They guarantee the right and privilege of equality in representation.

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. * * *" Fourteenth Amendment, Section 1.
>
> "The Congress shall have power * * * to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers fixed by this Constitution for the Government of the United States or in any department or officer thereof." Constitution, Art. 1, Sec. 7, Clause 18.
>
> "The times, places and manner of holding elections for senators and representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators."

The Congress, therefore, had power by legislation to require the equality implied by the Constitution and had express power under the grant last quoted to make regulations or alter regulations made by a State Legislature as to the times, places and manner of holding elections for

representatives. Under this grant Congress has exercised the power to make regulations as to the places and manner of holding elections for representatives by requiring in the acts specially pleaded in the petition in this case that the election shall be by districts composed of contiguous territory and containing as nearly as practicable an equal number of inhabitants and by the act also pleaded of January 16, 1901, requiring such districts to be composed "of contiguous and compact territory."

The Federal law is supreme.

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Const., Art. VI.

See *ex parte* Siebold, 100 U. S. p. 386.

Wesberry v. Sanders, 376 U.S. 1, 17 (1964)

By the Federal Statutes passed prior to the act assailed the districts were required to be composed of contiguous territory and to contain as nearly as practicable an equal number of inhabitants. By the Federal act passed afterwards the districts were required to be composed of compact territory in addition to the requirements before made. If the State act was not in conformity with the subsequent Federal act, it was invalidated by the passage of the later act. This, however, is immaterial, as the State act was clearly repugnant to the prior Federal acts.

The State Act of 1890 did not provide districts "containing as nearly as practicable an equal number of inhabitants." This is clearly shown by the statement in this brief. The facts are admitted by the demurrer. The districts created by the State act do not contain as nearly as practicable an equal number of inhabitants whether tested by the census of 1880, 1890 or 1900. By the census of 1880, taken ten years before the passage of the act assailed, there were more than one and three-fifths times as many voters in the fourth district as in the tenth. There was nearly as much difference between the eighth and the eleventh and between the seventh and the eleventh. By the census of 1890, taken the same year the act was passed, there were more than one and one-half times as many voters in the eleventh as in the eighth and other discrepancies almost as bad. By the amendatory Act of March 12, 1898, two counties were added to the eleventh and one was taken away, making a net addition of ten thousand population to the largest district according to the census of 1890. By the Act of March 11, 1898, another county of over eight thousand population was added to the eleventh, the largest district. And these additions were made eight years after the census of 1890, and are not referred to in the opinion.

A disproportion of more than three to two might be tolerable and tolerated in State representative or senatorial districts where the State Constitution forbade the division of a county. There might be some excuse for such a disproportion where it resulted from a desire to avoid the dismemberment of a single very populous

county in a State, but we submit it is not to be tolerated where, as in this case, the disproportion might be easily avoided without crossing county lines by simply moving some of the small counties from a district which was too large to an adjoining district which was too small. It is not just that two men in one district should have more than the voting power of three men in an adjoining district of the same State.

It is not denied that the State of Kentucky as at present divided into counties is susceptible of division into eleven congressional districts, each of which would be composed of contiguous and compact territory, and each of which would contain a reasonably and approximately equal number of inhabitants, and this could be done without dividing any county, except in one instance in which the county of Jefferson, containing the city of Louisville, is the whole of one congressional district.

There are no authorities which we have been able to find upon the question of congressional apportionment. Cases of unequal division of representative and senatorial districts in the various States under constitutional provisions similar to the provisions of the Federal Statutes here invoked are numerous. The principle is practically the same, and is thus stated in Williams v. Secretary of State (Mich), 108 N. W. 749, decided July 24, 1906:

> "The State can not be divided into * * * districts with mathematical exactness, nor does the Constitution require it. It requires the exercise on the part of the Legislature of an honest and fair

> discretion in apportioning the districts so as to preserve as nearly as may be the equality of representation. This constitutional discretion was not exercised. * * * The facts themselves demonstrate this beyond controversy, and no language can make the demonstration plainer."

In Giddings v. Blacker, 93 Mich. 1, eight State senatorial districts had nearly double the population of eight other senatorial districts. The apportionment act was held invalid.

In the case of Parker v. State, 133 Ind. 178, eleven districts had about one and one-half times the population of eleven other districts. The act was held invalid.

In the Williams case, quoted *supra*, some of the legislative districts contained about double the population of others. The act was held invalid.

III.

THE JUDICIAL QUESTION.

The courts have jurisdiction to determine the validity of the Apportionment Act.

This has been decided on so frequently as to be unquestionable.

McPherson v. Blacker, 146 U. S. 1.
Ragland v. Anderson, 125 Ky. 141.
Purnell v. Mann, 105 Ky. 91.
People v. Thompson, 155 Ill. 460.
Parker v. State, 133 Ind. 178.
Denny v. State, 144 Ind. 543.
Williams v. State, 108 N. W. 749.

Giddings v. Blacker, 52 N. W. 944.
State v. Cunningham, 83 Wis. 90.
State v. Cunningham, 81 Wis. 440.
Sherrill v. O'Brien, 188 N. Y. 185.

And see Brooks, Clerk, v. State, 162 Ind. 568, which collates all the leading cases on this subject to the date of the opinion.

IV.

MOOT QUESTION.

We are well aware that by the ruling of this court it can not be required to determine a moot case wherein its judicial power can not be exercised and where its judgment would not be final and conclusive upon the rights of the parties. That question will very possibly be raised here, for the reason that this case was prepared with special reference to the congressional election in November, 1908, and in full confidence that a final decision would be reached by this court before the date of that election if the highest court of Kentucky should decide in favor of the validity of the act. With that object in view, this suit was filed January 7, 1907. It was argued and submitted in the trial court on March 27th. The trial court intimated from the bench at the argument what its decision would be, but did not decide the demurrer until June 27th. As promptly as possible the record was obtained and filed in the Court of Appeals on August 27th. It was submitted to the court on October 16, 1907. Not until March 11, 1908, was the judgment

of affirmance rendered, and it was then too late by any possibility to secure its determination by this court before the November election of 1908.

We should be uncandid if we did not avow that, because this case was prepared with special reference to that election, because the great majority of the averments relate to that election, and that election is now past, a casual examination of the record would lead to the conclusion that it was a moot case.

But we submit that the averments of the petition which was dismissed on demurrer present a case where the judgment of this court will be final and conclusive of the rights of the parties, which this court may and should decide upon existing facts and rights, where substantial relief can be granted effective for the preservation of the rights of the plaintiff in error and other citizens of Kentucky, and where the rights upon which a decision is asked are substantial rights to protect which relief should be granted.

The petition sets out in full detail the rights and qualifications of the plaintiff in error as a citizen, elector and voter in Hart County, Kentucky, the status of that county with respect to congressional elections, the status of the congressional districts before the passage of the act assailed, the status attempted to be created by that act, the Federal Statutes to which that act is repugnant and the manner and extent of its repugnancy. It sets out in full detail, also, the mode in which the defendant officials will, unless restrained by the court, certify and print upon the ballots the names of the nominated can-

didates for Congress of the various political parties. It does this last, it is true, with specific reference to the congressional election of November, 1908. For the reasons heretofore stated, it makes specific averments and seeks specific relief as to that election, but it avers also "and said defendant's, said H. V. McChesney's successor in office will continue to act in like manner as to nominees in Congress in the Commonwealth of Kentucky unless this court shall enjoin and restrain him therefrom" (R. p. 8).

The status averred is a continuing status so far as legislation is concerned. This court knows judicially that no new congressional apportionment act has been adopted in Kentucky, and knows also that the provisions in the Federal Statutes to which that act is repugnant are still in force. The status of the plaintiff in error as a citizen, elector and voter are presumed to be continuing. His rights are presumed still to exist and his rights and privileges as a citizen of the United States and the right of all other citizens of Kentucky are still invaded by this act which denies to him and them the right, and deprives him and them of the privilege given, by implication in the Constitution, and specifically by the acts of Congress, to an equal voice in the selection of the Congressmen who are to represent Kentucky in the Federal Congress.

The prayer of the petition also was drawn with specific reference to the election of 1908 and asks specific relief with respect to that election. But it does more. It continues "and plaintiff further prays that said defend-

ant McChesney and his successor in said office be enjoined and restrained from proceeding under or in accordance with said void and unconstitutional act, approved respectively May 26, 1890, March 12, 1898, and March 11, 1898, or from certifying to the various county court clerks of Kentucky the names of any nominees for said office of member of Congress according to said void and unconstitutional acts. * * * And plaintiff prays for all proper and general relief."

If, under such general averments, and such a general prayer, relief can not be granted by the court of last resort, then it follows that no relief can be given against any gerrymander, no matter how infamous, if the courts of the State, elective by the same majority which elects the Legislature, do not wish the relief granted, or are not willing that it should be. No imputation is designed upon the courts who have hitherto passed upon this case. It is assumed that the delay in this case was the result of motives entirely proper. The Court of Appeals of Kentucky in Ragland v. Anderson, *supra,* affirmed the judgment of two circuit courts granting relief against a most infamous gerrymander of the Kentucky Legislative districts, whereby a voter in one district was given more than seven times as much voting power as a voter in another district. As has been said, there is no intention to reflect upon the courts. But this court will observe from this case how easily a case may be delayed until the term of the particular officer sought to be enjoined expires, or until the next election is passed and gone, if the courts so desire.

The law is well settled in Kentucky and elsewhere that where relief is sought against a person in his official capacity to compel or restrain official action, the suit does not abate by reason of the death, resignation or expiration of the term of office of the incumbent officer, even when such fact is pleaded in the proceeding. "A change in the membership of the board does not so change the parties as to abate the proceedings. The constituent parts of the board may not be the same, but the representative body remains identical."

Maddox *et al.* v. Graham & Knox, 2 Metc. 71.
City of Louisville v. Kean, etc., 18 B. Mon. 13.

In Lindsay v. The Auditor of Kentucky, 3 Bush, 235, Judge Williams, delivering the opinion of the court, said:

> "So with the office of State Auditor; the individual holding the office at any given period may resign, or die, or remove from the State, but the office continues, and his successor's duty is to guard the interest of the State in all legal proceedings commenced by or against him."

These cases are cited merely to show the doctrine in Kentucky. Authorities might be multiplied from other States.

We ask a reversal of the judgment.

Respectfully,

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Attorneys for Plaintiff in Error.

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Of Counsel.

Supreme Court of the United States.

No. 23.—October Term, 1910.

Charles Richardson, Plaintiff in Error, vs. H. V. McChesney, Secretary of State of the Commonwealth of Kentucky, et al. } In error to the Court of Appeals of the State of Kentucky.

[November 28, 1910.]

Mr. Justice Lurton delivered the opinion of the Court:

Shortly stated, this is an attack upon the validity of the Kentucky act of March 12, ~~1900~~, and certain amendments thereto, apportioning the State into eleven Congressional districts. The bill alleges that the districts do not conform to the requirement of the acts of Congress apportioning representatives among the States, which acts require that such districts shall be of contiguous territory, "containing as nearly as practicable an equal number of inhabitants." The averments of the bill are that the districts are grossly and unnecessarily unequal in population.

The bill was filed in an equity court of the State. A demurrer, as not stating a case good in law, was sustained and the bill dismissed. This judgment was affirmed upon an appeal to the Court of Appeals of Kentucky. The ground upon which the Kentucky court rested its judgment was, in substance, that neither the Constitution of the United States nor of the State contained any provision which vested in the court any authority to annul an apportionment of the State into districts for the election of Congressmen, and that the matter pertained to the political department of the government, and was subject only to the supervising control of the Congress, if any such power of supervision existed at all.

The bill, in substance, alleges that a Congressional election in each of the eleven Congressional districts of the State will be held in November, ~~1909~~. That under the law of Kentucky it is the duty of the defendant H. V. McChesney, as secretary of the Commonwealth, or his successor in office at the time, to certify, within sixty days prior to said election, the names of the nominees of the Republican and Democratic parties for members of Congress in each district, to clerks of the various county courts of the State, and the duty of such clerks to print the names so certified upon the official ballots to be used in said Congressional election.

The complainant's interest in the matter is that he is a citizen of the

United States and of the State of Kentucky, and a qualified voter and resident of Hart County, one of the counties of said State, and as such entitled to vote for a Congressman in the district to which that county is lawfully attached. The act of the general assembly dividing the State into Congressional districts prior to the act of March 12, ~~1900~~, was an act passed April 15, 1882. By this act of 1882 the counties of Hart, Green and Taylor formed part of the Fourth Congressional district. By the act of March 12, ~~1900~~, and acts amendatory, the three counties named were made part of the Eleventh district, and certain counties were taken from the Eleventh and placed in other districts.

The contention is that the act of ~~1900~~ and its amendments being void, because of gross inequality of inhabitants, the aforesaid act of April 15, 1882, is the apportionment act in force, and that the approaching election should be held for the election of eleven members of Congress in the eleven districts organized by the act of 1882, and not in the districts as shaped by the later illegal arrangement.

The object and prayer of the bill is to require the defendant H. V. McChesney, or his successor in office, to proceed in conformity with the apportionment act of April 15, 1882, by certifying the names of party nominees for Congress made in districts organized in conformity with that act, and to require the county court clerks, who are made defendants, to print only the names of nominees so certified upon the ballots for the election of Congressmen at the election to be held in November, 1908, and that said McChesney, or his successor, be restrained from certifying, or the defendant clerks from printing, otherwise.

Without considering the question of the authority for judical interference in respect of a Congressional apportionment act, we are of opinion that this writ of error must be dismissed,

The matter which the defendant McChesney, as secretary of the Commonwealth of Kentucky, is to be prohibited from doing relates solely to an election to be held in November, 1908, and the thing which he is to be required to do relates only to the same election. The election to be affected by a decree, according to the prayer of the bill has long since been held, and the members of Congress were, in November, 1908, elected under the apportionment act of 1900. They were, as we may judicially know, admitted to their respective seats, and, as we may also take notice, their successors have been elected according to the same scheme of apportionment. The thing sought to be prevented has been done, and cannot be undone by any judicial action. Under such circumstances there is nothing but a moot case. *Mills* v. *Green*, 159 U. S. 651; *Jones* v. *Montague*, 194 U. S. 147.

The duty of the court is limited to the decision of actual pending con-

troversies and it should not pronounce judgment upon abstract questions, however such opinion might influence future action in like circumstances.

Aside from this, we may judicially take notice that the defendant H. C. McChesney is no longer secretary of the Commonwealth of Kentucky, his term having expired and a successor having been inducted into office, who has not been substituted as a defendant to this suit.

This is not a suit against the State of Kentucky. The State is not the subject of suit. Nor is it a suit against the secretary of State as one of a corporation or continuing board, "where the obligations sought to be enforced devolve upon a corporation or continuing body," as pointed out in *United States* v. *Butterworth*, 169 U. S. 600, 603, distinguishing *Commissioner* v. *Sellew*, 99 U. S. 624, and *Thompson* v. *United States*, 103 U. S. 480. The only ground for making McChesney a defendant is to enjoin him personally from doing something which he may not lawfully do, and to require him personally to do another thing which it is claimed is his legal duty to do as an administrative act requiring no discretion. If he disobey the mandate or injunction of the court he personally would be in contempt. He only can be rightly made to bear the costs of this proceeding if the complainant should succeed, and he only could be compelled to obey the decree of the court. As his official authority has terminated, the case, so far as it seeks to accomplish the object of the bill, is at an end, there being no statute providing for the substitution of McChesney's successor in a suit of this character. The case is governed by *United States* v. *Boutwell*, 17 Wall. 604; *United States*, v. *Butterworth*, 169 U. S. 600, and *Caledonian Coal Co.* v. *Baker*, 196 U. S. 432, 441.

Dismiss the writ of error.

True copy.

Test:

Clerk Supreme Court, U. S.

TRANSCRIPT

OF

RECORD

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted].

No. [redacted].

LUCIO ALMEIDA SEABRA SOUZA AND [redacted],
PLAINTIFFS IN ERROR,

vs.

EDUARDO ARANHA.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF [redacted].

FILED FEBRUARY 12, [redacted].

(21,018.)

(21,018.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 277.

LUCINO ALMEIDA CHANTANGCO AND ENRIQUE LETE, PLAINTIFFS IN ERROR,

vs.

EDUARDO ABAROA.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 28, 1908.

1 UNITED STATES OF AMERICA,
Philippine Islands:

In the Court of First Instance of the Province of La Unión, Third Judicial District.

Civil Cause, No. 286.

LUCINO ALMEIDA CHAN TANCO Y ENRIQUE LETE, Plaintiffs,
vs.
EDUARDO ABAROA, Defendant.

Bill of Exceptions.

It is hereby made of record that in the Court of First Instance of La Unión, Third Judicial District, the following proceedings have been had in an ordinary action, viz.:

On January 22, 1904, Lucino Almeida Chan Tangco by his attorney, Felipe G. Calderón, filed a complaint against Eduardo Abaroa Chan Em, of which the following is a copy:

Complaint.

UNITED STATES OF AMERICA,
Philippine Islands:

In the Court of First Instance of La Unión, Third Judicial District.

LUCINO ALMEIDA CHAN TANGCO, Plaintiff,
vs.
EDUARDO ABAROA, Defendant.

For Indemnification of Damages.

The plaintiff, by his attorney, respectfully represents:

1. That on or about March 1st, 1903, he was a resident of this City of San Fernando, of La Unión, being the only and exclu-
2 sive owner of a storehouse and sales store situated in this City.

2. That on the night of said March 1st, 1903, the storehouse and store were burned together with all the goods on hand in the same.

3. That at the moment of the occurrence of the above-mentioned fire there were in the building the goods set out in the affidavit hereto attached and marked with the letter "A," the value of the said building with all the goods then existing in the same being $58,473.49½ Mexican itemized in the affidavit hereto attached which forms an integral part of this complaint.

4. That the said building together with all the goods and stock was burned maliciously or unlawfully by Eduardo Abaroa Chan Em, on the said date, March 1st, 1903.

5. That in consequence of the said burning of the building and the goods therein contained, the plaintiff lost all the goods above set forth, the value of which amounts to $58,473.49½ Mexican.

6. That besides the loss of the value of the goods burned, the plaintiff has lost the profits which he could have made on the said $58,473.49½, computed as interest at eight per centum per annum, from the 2nd day of March, 1903.

I ask the Court to render judgement against the defendant condemning him:

1st. To pay the said $58,473.49½:

2nd. To pay the interest on said sum at the rate of eight per cent. per annum from March 2nd, 1903 until the execution of the judgment:

3rd. To pay the costs of this cause:

4th. Any other relief which the Court may deem proper.

Manila (for San Fernando, Unión) January 25, 1904.

(Sgd.) FELIPE G. CALDERÓN,
Attorney for the Plaintiffs.

Attached to said complaint there was filed a sworn statement, the original of which is hereby made a part of this
3 bill of exceptions.

On February 27, 1904, the defendant by his attorney, Wade H. Kitchens, filed the following answer:

UNITED STATES OF AMERICA,
Philippine Islands:

In the Court of First Instance of La Unión.

LUCINO ALMEIDA CHAN TANGCO, Plaintiff.
vs.
EDUARDO ABAROA, Defendant.

Answer.

The defendant in the above entitled cause appears in this Court by his attorney, and with the consent of the Court first had amends his answer to the complaint in this cause and sets forth:

1. That in general terms he denies each and every one of the allegations contained in each and every one of the paragraphs of the complaint, and as a special defense alleges:

A. That the action brought by the complaint in the above entitled cause has been adjudged by the Supreme Court of these Islands in the criminal action for the burning and damages alleged in the complaint in this cause wherein the plaintiff herein, Lucino Al-

meida, appeared as private prosecutor and the defendant as accused, and that final judgement was rendered in said criminal action by said Supreme Court in favor of the accused (now the defendant in this cause) affirming the judgement of this Court which was an acquittal of the accused, finding him not guilty of having burned the said building in question and in consequence thereof not responsible for any damages to the complainant, and therefore the action brought is found to be "*res adjudicata.*"

4 San Fernando, March 4, 1905.

WADE H. KITCHENS,
Counsel for Defendant.

Lingayen, P. I.

March 4, 1905, by agreement of counsel for both parties, the complaint was amended so as to include Enrique Lete Chantangco as plaintiff in addition to the original plaintiff Lucino Almeida Chantangco; and on the same day the defendant filed an amended answer, a copy of which follows:

Amended Answer.

UNITED STATES OF AMERICA,
Philippine Islands:

In the Court of First Instance of the Province of La Union.

No. 286.

LUCINO ALMEIDA CHAN-TANGCO and ENRIQUE LETE CHAN-CHUANCO, Plaintiffs,
vs.
EDUARDO ABAROA, Defendant.

Answer.

The Defendant in the above entitled cause appears in this Court by means of his counsel, and by previous permission of the Court amends his answer to the complaint of record and manifests:

(1) That he denies all and each of the allegations on all and each of the paragraphs of the complaint, and as a special alleges:

5 A. That the action raised by the complaint in the above entitled cause has already been adjudged by the Supreme Court of these Islands in a criminal action over the fire and damages alleged in the complaint in this cause, in which Lucino Almeida, the plaintiff in this cause was private complainant, and the defendant was defendant, and that final sentence was pronounced in said criminal cause by said Supreme Court in favor of the defendant (to-day defendant in this cause) confirming the sentence of this Court which acquitted the accused, finding him not guilty of having burned the camarin referred to in the records and consequently not

responsible for any damages to the plaintiff, and therefore the action brought is *res adjudicata*.

San Fernando, March 4, 1905.

(Sgd.) WADE H. KITCHENS,
Counsel for Defendant.

Lingayen, P. I.

The hearing of the cause took place the 10th day of March, 1905, and the plaintiffs presented as proof the testimony of various witnesses and also the following documents: 1. A list or inventory naming the goods contained in and burned with the camarin and store and the value of each and the total value of the same; 2. A certified copy of the sentence rendered by the Court of First Instance of La Union in criminal cause No. 282, The United States *vs.* Eduardo Abaroa; and (3) a copy of the sentence of the Supreme Court of the Philippine Islands in the cause of the United States *vs.*
Eduardo Abaroa, General Register No. 1,423, as appears in
6 the Official Gazette of February 5, 1904.

In his defense the Defendant presented the testimony of various witnesses and a plan or sketch used by the witness Fernando Guerrero.

The originals of said documents and the stenographic notes taken of the testimony of the witnesses are hereby made part of this bill of exceptions and constitute all the evidence admitted in said cause.

The 24th day of April, 1905, the Court rendered its judgment, a copy of which follows:

7 THE UNITED STATES OF AMERICA,
Philippine Islands.

In the Court of First Instance for the Province of Union, Third Judicial District.

Civil Case, No. 286.

LUCINO ALMEIDA CHAN TANGCO Y ENRIQUE LETE, Plaintiffs,
vs.
EDUARDO ABAROA, Defendant.

Decision.

This case came on for trial at San Fernando, Unión, on the 10th day of March last, the trial lasting two days, the Court reserving its decision. The plaintiffs were represented by Mr. W. H. Lawrence, of Manila, and Mr. Fontanilla, of San Fernando, attorneys at law, and the defendants by Messrs. Kitchens & Moran Attorneys at law, of Lingayen, P. I.

It is an important case, for if in law the plaintiffs are entitled to recover in any sum, it could not, under the evidence be for a less sum than approximately 60,000 pesos, Mexican Currency, reduced to Philippine Currency at the commercial rate of exchange on March

1, 1903, the date of the alleged commission of the act which is alleged to be the cause of action, there being little or no controversy as to the value of the property, alleged to have been destroyed by the burning of a camarin and contents belonging to the plaintiffs, which is alleged to have been the malicious, or illegal act of the defendant; and it is well to note carefully in the outset that the act is alleged to have been malicious, or illegal, and not that the burning of the camarin and contents was the result of negligence on the part of the defendant, which does not involve criminality; for the right of recovery in damages would not be the same in the one case as in the other.

It is an action for the damages arising from an alleged act which, if true, constitutes the crime of arson, as defined and punish-
8 able under Article 549 of the Penal Code, and the same offense for which this defendant has heretofore been criminally prosecuted.

It is not alleged in the complaint, nor does the evidence establish that the defendant was found guilty in said criminal cause. *Per contra*, evidence introduced by the plaintiffs shows that in said criminal action the prosecution failed to prove that he had committed the crime, and he was therefore acquitted.

The complaint does not allege that this crime, or the defendant, is included in any one of the exceptions mentioned in Articles 18 and 19 of the Penal Code, nor is such exception shown by the evidence, which might give the plaintiffs the right to bring this action without the criminal guilt of the defendant being first established.

Article 1092 of the Civil Code provides that "Civil obligations arising from crimes or misdemeanors, shall be governed by the provisions of the Penal Code." Article 17 of the Penal Code provides that "Every person criminally liable for a crime or misdemeanor is also civilly liable," and Articles 18 and 19 of said Code enumerate the exceptions where a person may be held civilly liable in which the law has exempted him from criminal liability.

In U. S. *vs.* Catequista, 1 Phil. Rep. 537, the Supreme Court of the Philippine Islands in commenting on the civil liability resulting from criminal acts, decided that "The Court also erred in not determining in the judgment the civil liability of the defendant for the defendant for the daños and perjuicios which resulted from the criminal act. Such civil liability is a necessary consequence of criminal responsibility (Penal Code, Art. 17), and is to be declared and enforced in the criminal proceeding—except where the injured party reserves his right to avail himself of it in a distinct civil action. (Code of Criminal Procedure of Spain, Article 112; Provisional Law for the application of the Penal Code in the Philippines, Article 51, No. 4.)"

Again in U. S. *vs.* Fernandez, 1 Phil. Rep. 539, the Court says:

9 "It is necessary to hold constantly in mind the provisions of section 107 of General Order No. 58, when considering the rights of the party injured by the commission of the offense, and further that all public offenses tried before the Courts of First In-

stance must be prosecuted by complaint or information, in accordance with Section 3 of the General Order cited. As the private prosecutor, Cirilo Mapa, filed a complaint in his capacity as the injured party and entitled to take part in the prosecution of the crime of which the defendants are charged, and for the purpose of enforcing against them their civil liability, it is evident that the case was properly commenced by the filing of the said complaint."

Viada, in his commentaries on the Penal Code, Edition of 1885, Page 68, says:

"We see from the above article (referring to Article 18 of the Penal Code, which treats of persons civilly liable for crimes and misdemeanors) that civil responsability follows the criminal responsibility. It is a sequence of this principle that exemption from criminal responsibility also carries with it the exemption from civil responsibility."

It does not appear that injured parties reserved their right in the prosecution of the criminal case to institute a distinct civil suit for the recovery of the daños and perjuicios resulting from the alleged crime, and it is the opinion of the Court that it was not in the power of the trial judge to reserve for them that right upon rendering a decision at the close of the prosecution acquitting the defendant. This court, as now constituted, is of the opinion that the reservation by the trial judge is inconsistent with his finding that the criminal guilt of the defendant had not been shown. In any event such a reservation could not have full force in the present case which is brought in the name and on behalf of two persons jointly, one of whom did not appear in the criminal case, the attempted reservation being in favor of the other one only.

The plaintiffs contend that the decision of the Supreme Court and the lower Court acquitting the defendant did not determine the civil responsibility. This court cannot agree with this contention, for the reason that the decision did determine that the fact upon which the civil responsibility must rest, towit: the burning of the camarin and contents by the defendant, had not been established. Therefore, if (aside from certain exceptions which do not include upon the present case), a criminal conviction is the basis upon which the civil suit must rest, the failure to allege such conviction in the complaint, and prove it by competent evidence at the trial, leaves this suit without foundation, and it must fall.

Conceding, however, that this is not a sound proposition of law, as there appears to have been no right reserved to bring this action on the part of the plaintiffs at the inception, or at any stage of the criminal prosecution, under the first of the decisions above cited, the plaintiffs could not recover in a distinct civil action, and especially so after having tried and failed to recover in the criminal action, because there was an acquittal, as shown by the copy of the decision of the Supreme Court and of the trial Court, both of which were introduced in evidence by counsel for the plaintiffs.

Counsel for plaintiffs contend that the Supreme Court, in U. S. *vs.* Abaroa, Off. Gaz. Vol. 11, No. 5, has affirmed without change the judgment of this Court, in which the right of these plaintiffs to

bring a civil action for the damages is reserved to them. Counsel further contend, that,

"If this reservation had been errone-us, the Supreme Court would have corrected it; that having affirmed the judgment in all its parts the Supreme Court gives its express sanction and approval to the ruling of this Court, that such a civil action might be maintained, and establishes a rule which this Court is bound to follow."

If this court, as now constituted, could agree with counsel that the learned trial Judge had properly reserved the right of action for the damages, or with counsel's contention as to the extent to which the affirmance of the Supreme Court goes, then the Court would follow the rule. But this Court is not of the opinion that the Supreme Court gave, or intended to give, its express sanction and approval to the ruling of this Court as contended by the able counsel. The Court can not see why the Supreme Court should have adjudicated this question unless it had been raised in that Court, and certainly the injured party did not, the government would not, and defendant had not appealed or filed exceptions as shown by the report of the case in evidence.

According to the decision of the Supreme Court of the United States in the celebrated case of the U. S. *vs.* Kepner, the defendant has already been twice in jeopardy, once in this court and again in the Supreme court. If he were again prosecuted criminally, he could plead not only *autre fois acquit*, and former jeopardy, but twice acquitted and twice in jeopardy. Still the plaintiffs insist on further right of suit to recover damages based upon alleged criminal acts of which he has been twice acquitted under the claim of a reserved right by both courts that acquitted him.

11

This Court can hardly believe that the high honorable Supreme Court of these Islands meant such by the decision which it rendered. At all events, it will doubtless have another opportunity to say just what it did mean, and it will then be the pleasure, as well as duty, of this Court, to follow its direction and ruling specifically made.

Counsel for plaintiffs in their reply brief accentuate the law that the criminal and civil action can not both be pending simultaneously. Why should this be so, if the right to the civil is not conditioned upon the result of the criminal action? In other words, does not their contention support the proposition that a conviction of the crime is a condition precedent to recovery in a separate civil suit? It would seem so. He cites the law that,

"Actions arising from a crime or misdemeanor may be presented together or separately, but the civil action shall not be instituted separately whilst the criminal action is pending, until final judgment shall have been rendered in the latter."

Why wait for final judgment in the criminal action, if not for the purpose of ascertaining whether it will be such as will furnish a basis for a civil action? If a conviction is the result, a civil suit will lie; if the judgment is an acquittal, no civil action will lie, because nothing to lie upon.

Counsel also cites as law, that

"the criminal action having been instituted the civil shall be deemed to have been utilized unless the injured party should renounce it, or should expressly reserve it to be instituted after the criminal proceeding shall have terminated, provided such action will lie.

What *is* the condition mean in this last proviso? It must mean that no civil action will lie unless there is a conviction of the defendant.

12 This Court is fully conscious of the fact that this decision is not in perfect harmony with its ruling made at an *early* stage of the trial, when the defendant's plea was overruled; but that was a hasty decision rendered without an opportunity to properly study and construe the law applicable and before any law had been cited by counsel; and if, (as it now believes) the court then erred, it makes haste to avail itself of this opportunity to correct the error; and if the Court has erred herein, there is a higher, more honorable and learned tribunal to correct its errors.

The Court finds that:

1. The plaintiffs do not allege in their complaint that the defendant was convicted of the crime alleged therein to be the basis of action.

2. The plaintiffs do not allege in the complaint that they reserved their right to bring this distinct civil action to recover damages resulting from the alleged commission of the criminal act.

3. The evidence in this case does not establish a conviction in the criminal action, but on the contrary shows an acquittal of the defendant.

4. The evidence in this case does not show that plaintiffs reserved their right to instituted this separate civil suit to recover the alleged damages resulting from the alleged criminal act, but it shows the contrary.

5. The evidence shows, and the Court so finds, that the plaintiffs have had their day in Court; that they reserved no right, but that one of them, at least, appeared by counsel, Mr. Felipe D. Calderon, in the Supreme Court, on appeal, to assert that right and claim to indemnification; and the presumption is that he did so, in the fullest measure of his duty.

Wherefore the Court decides that:

A. The complaint does not state facts sufficient to constitute a cause of action. (See Sec. 93, Act. 190.)

B. That the evidence adduced on the trial does not establish facts sufficient to constitute a cause of action so as to allow an amendment of the complaint.

13 C. As a legal consequence the plaintiffs must fail, and the Court holds that they are not legally entitled to recover in any sum, irrespective of the character and weight of the other evidence in the case.

The Court, therefore, renders judgment in favor of the defendant and orders and adjudges that the plaintiffs pay the costs of this action.

It is further ordered that this judgment shall take effect from the time it is received and filed at San Fernando, Union, by the clerk of the Court of First Instance, of Union Province.

Done and dated at Lingayen, Province of Pangasinan, P. I. this 24th day of April, 1905.

(Firmado) JAMES C. JENKINS,
Judge Third Judicial District.

14 On the 12th day of May, 1905, the plaintiffs after being notified of said sentence filed their exception to the same.

The 15th day of May, 1905, the plaintiffs by their counsel Valerio Fontanilla, filed a motion asking for a new trial of the cause, a copy of which is as follows:

Motion for New Trial.

UNITED STATES OF AMERICA,
Philippine Islands:

Court of First Instance of La Unión.

Civil Cause, No. 286.

LUCINO ALMEIDA CHAN-TANGCO and ENRIQUE LETE, Plaintiffs,
vs.
EDUARDO ABAROA, Defendant.

The undersigned, counsel for the plaintiffs, appears and prays for a new trial of the above entitled cause, basing the petition on the ground that the findings of the sentence are not in accord with the proofs presented in the trial and that the sentence is contrary to law.

(S'g'd) VALERIO FONTANILLA,
Counsel for Plaintiffs.

The 22nd day of May, 1905, the plaintiffs by their counsel, Pillsbury & Sutro, filed another motion for a new trial, a copy of which follows:

Motion for New Trial.

UNITED STATES OF AMERICA,
15 *Philippine Islands:*

In the Court of the First Instance of the Province of La Union, Third Judicial District.

Civil Cause, No. 286.

LUCINO ALMEIDA CHAN-TANGCO and ENRIQUE LETE, Plaintiffs,
vs.
EDUARDO ABAROA, Defendant.

Come now the undersigned counsel in representation of the plaintiffs in the above entitled cause and pray the Court to grant a new trial for the following reasons, to wit:

1. Because the sentence rendered is contrary to law.

2. Because it appears in the proofs presented to the Court during the hearing of the case that the plaintiffs are entitled to have judgment rendered in their favor.

3. And in special representation of the plaintiff Enrique Lete, because the effect of this judgment is to deprive him of his property without permitting him to defend himself in the proper suit, the plaintiff Lete not having been a party to the criminal cause referred to in the judgment of the Court, and therefore is in nowise bound by the sentence of the Court rendered in said criminal cause, acquitting the defendant of the charge of arson for which he was tried as appears in the decision and judgment rendered in this cause.

4. And for other reasons which appear in the first trial of the cause.

Manila, P. I., May 17, 1905.
(S'g'd) PILLSBURY & SUTRO,
Counsel for Plaintiffs.

The 31st day of May, 1905, the petitions for rehearing were
16 decided by the Court in the following order:

UNITED STATES OF AMERICA,
Philippine Islands:

In the Court of First Instance of the Province of La Unión.

Civil Cause, No. 286.

LUCINO ALMEIDA CHAN-TANGCO and ENRIQUE LETE CHAN-CHUANCO, Plaintiffs,
vs.
EDUARDO ABAROA, Defendant.

Order.

At the instance of the plaintiffs, the hearing having been set in Lingayen of the motions asking for a new trial of the above entitled cause which were filed by the counsel for the plaintiffs on May 15 and 22, 1905, respectively, the plaintiffs being represented by Mr. Fontanilla of San Fernando and the defendants by Messrs. Kitchens & Moran of Lingayen; and after hearing the arguments of the counsel for both parties, the Court is of the opinion that the sentence is in accordance with the proofs and the law, and therefore should, and hereby does overrule said motions.

Lingayen, P. I., May 31, 1905.

(Sgd.) JAMES C. JENKINS, *Judge.*

On the same day, May 31, 1905, the plaintiffs excepted to said order and at the same time announced their intention of filing a bill of exceptions in order to carry the case to the Supreme Court.

On the 1st day of June, 1905, this bill of exceptions was
17 filed by the plaintiffs, and after due notice to both parties, and after correcting the same to the satisfaction of both parties, and by agreement of the same, I approve and sign the bill in Lingayen, P. I., this 25th day of September, 1905.

J. C. JENKINS, *Judge.*

UNITED STATES OF AMERICA,
Philippine Islands:

In the Court of First Instance of the Province of La Union, Third Judicial District.

I, Estanislao Tamayo, Clerk of the Court above named:

Certify: that the foregoing is the original bill of exceptions presented by the plaintiffs in civil cause in said Court under the title of "Lucino Almeida Chan-Tangco and Enrique Lete, Plaintiffs, *vs.* Eduardo Abaroa, Defendant, Civil Cause No. 286," and approved by the Honorable Judge of the Third Judicial District, Mr. James C. Jenkins, and that the documentary proof marked Nos. 1, 2, 3, 4,

and 5 attached to said Bill of Exceptions by means of a cord are those mentioned in the same.

In witness whereof, I sign these presents in compliance with the provisions of Article 2 of Act No. 1123 in San Fernando, La Union, November 4, 1905.

ESTANISLAO TAMAYO,
Clerk of the Court of First Instance of La Union.

Indorsement: Filed in the Clerk's office of the Supreme Court of the Philippine Islands this 10th day of November, 1905. 11:00 A. M. J. E. Blanco, Clerk.

18 *General Inventory of the Property Burnt in the Store of the Undersigned.*

12 dozen and 5 umbrellas, black cloth at...	$15.00	per	dozen....	$186.25	
5 dozen large shoes at.....	23.00	"	"	115.00	
4 dozen boys' tan leather shoes at.....	13.00	"	"	52.00	
2 dozen shoes, black second class for boys at	8.50	"	"	17.00	
3½ dozen " " " " " girls...	7.75	"	"	27.12	6/8
2 dozen " " tan leather shoes " ...	8.00	"	"	16.00	
10 " alpargatos (canvass sandals).....	7.50	"	"	75.00	
8 dozen cylinders at.....	2.50	"	"	20.00	
2½ dozen felt hats.....	25.50	"	"	63.75	
4½ " straw "	9.75	"	"	43.87	4/8
1 dozen hats, "adolfo".....	25.00	"	"	25.00	
3 " felt hats black.....	27.00	"	"	81.00	
1 dozen and five derby hats.....	30.00	"	"	42.00	
5 dozen hats, various colors for children....	18.50	"	"	92.50	
2 " " tinsim straw	16.00	"	"	32.00	
10 " wooden rosaries	1.40	"	"	14.00	
5 " copper rings	1.00	"	"	5.00	
6 dozen forks.....	3.75	"	"	22.50	
20 reams of ruled paper.....	2.25	"	ream....	45.00	
92 rolls of rubber elastic.....	.17	"	roll	15.64	
3½ gross of shoe strings.....	5.40	"	gross....	19.25	
9 dozen colored glass crosses.....	.75	"	dozen....	67.50	
3 gross haircombs, bone.....	16.00	"	gross....	48.00	
1½ " " 2nd class	11.00	"	"	16.50	
5 gross watch cords.....	6.75	"	"	33.75	
2 dozen small crosses.....	1.10	"	dozen....	2.20	
2 dozen rubber combs.....	15.00	"	"	30.00	
1 " " " colored	14.00	"	"	14.00	
4 " leather pocketbooks	3.25	"	"	13.00	
Total forward				$1234.80	

19

Bro't forward				$1234.80
4 dozen gilded medals.....	.80	per	dozen....	3.20
2 gross hooks and eyes.....	2.00	"	gross....	4.00
1 gross men's pipes.....	14.00	"	"	14.00
25 dozen playing cards, Deer brand.....	2.25	"	dozen....	56.25
10 " teaspoons, anchor brand.....	.70	"	"	7.00
15 " packs of cards, Tiger brand.....	2.60	"	"	39.00
65 sheets shell buttons.....	.60	"	sheet	39.00
2 gross shell buttons.....	18.50	"	gross....	37.00
1 " " " small	13.50	"	"	13.50
2 " " tortoise shell hair combs.....	13.00	"	"	26.00
10 dozen small penknives.....	2.50	"	dozen....	25.00
7 " penknives	1.20	"	"	8.40
5 " antijuelas	1.00	"	"	5.00

12 " cakes perfumed soap	2.25	"	"	....	27.00
5 " " " " 2nd class	1.10	"	"	....	5.50
4 gross pencils	4.25	"	gross	....	17.00
2 dozen ladies' belts	8.50	"	dozen	....	17.00
5 packages guitar strings	9.00	"	pkag.	....	45.00
4 " " " wire	1.00	"	"	....	4.00
3 boxes colored thread	2.80	"	box	....	8.40
15 dozen leather hat bands	1.20	"	dozen	....	18.00
1 " umbrellas, children's	12.50	"	dozen	....	12.50
1 " medals	1.20	"	"	....	1.20
5 " decks playing cards, Lion brand	2.00	"	"	....	10.00
12 " " " " Eagle "	1.85	"	"	....	22.50
2 " penknives, corkscrew attachments	1.75	"	"	....	3.50
2 " rubber shoes	20.50	"	"	....	41.00
3 gross rose buttons	3.50	"	"	....	10.50
550 wooden combs	1.80	"	100	....	9.90
2 dozen wooden pipes	.75	"	dozen	....	1.50
3 gross rubber tip pencils	5.50	"	gross	....	16.50
1 gross chevron pins	1.00	"	"	....	1.00
2 dozen pocketbooks	4.50	"	dozen	....	9.00
Total forward					$1792.89

20

Bro't forward					$1792.89
2 gross of penholders	2.50	per	gross	....	$5.00
12 boxes cigaret- papers	.80	"	box	....	9.60
20 " rice papers	1.20	"	"	....	24.00
10 " paper, rooster brand	1.00	"	"	....	10.00
12 " " crown "	1.30	"	"	....	15.60
2½ dozen porcelain chambers	13.50	"	dozen	....	33.75
20 reams paper, rough edge	3.50	"	ream	....	72.00
12 " " anchor brand	3.80	"	"	....	45.60
8 " " hammer brand	4.20	"	"	....	33.60
2½ dozen cooking pots	14.00	"	dozen	....	35.00
2 " brushes with mirrors	2.50	"	"	....	5.00
40 pieces wide hat ribbons	.80	per	piece	....	32.00
25 " narrow " "	.50	"	"	....	12.50
20 " colored " "	1.00	"	"	....	20.00
6 gross spools thread	4.50	"	gross	....	27.00
2 " " " pink	4.60	"	"	....	9.20
4 " " " colored	4.80	"	"	....	19.20
2½ dozen artificial flowers, large	5.00	"	dozen	....	12.50
2 gross hat linings	1.20	"	gross	....	2.40
4 dozen round ribbons, colored	2.10	"	dozen	....	8.80
5 " artificial flowers, 2nd class	2.00	"	"	....	10.00
4 " children's garters	.80	"	"	....	3.20
2 indelible pencils	8.50	"	gross	....	17.00
2 dozen cigaret- cases	2.00	"	dozen	....	4.00
10 " tin trays	1.40	"	"	....	14.00
3 " dolls	5.00	"	"	....	15.00
1 " " large	9.00	"	"	....	9.00
2 gross tin buttons	1.40	"	gross	....	2.80
3 " crystal buttons	4.00	"	"	....	12.00
2 dozen men's belts	9.00	"	dozen	....	18.00
4½ dozen colored woolen belts	11.00	"	"	....	49.50
2 dozen leather belts	4.00	"	"	....	8.00
Total forward					$2387.74

21

Br't forward					$2387.74
2 gross pant buttons	2.10	per	gross	....	4.20
6 dozen tin plates, large	2.00	"	dozen	....	12.00
35 pieces white lace	3.50	"	piece	....	122.00
22 " colored lace	1.40	"	"	....	30.80
28 " pink "	1.00	"	"	....	28.00
15 " narrow "	1.00	"	"	....	15.00

150 " wide ribbon	.40	"	"	60.00
80 " narrow lace	.35	"	"	28.00
2 gross ladies' hair combs	14.00	"	gross....	28.00
1½ " " " " large	16.50	"	"	24.75
4 dozen metal syringes	9.50	"	dozen....	38.00
3 gross colored cotton thread	3.00	"	gross....	9.00
25 dozen stockings, girls	1.20	"	dozen....	30.00
5 gross yellow shoe strings	2.80	"	gross....	14.00
5 dozen boxes cananga face powder	1.20	"	dozen....	6.00
2 " powder puffs	2.60	"	"	5.20
5 gross toys	8.50	"	gross....	42.50
1½ dozen hats	18.50	"	dozen....	27.75
1 " white felt hats	17.50	"	"	17.50
2 " dolls, movable eyes	9.00	"	"	18.00
1 " accordians large	40.00	"	"	40.00
3 " umbrellas, spring	25.00	"	"	75.00
2 " straw hats for girls	8.00	"	"	16.00
1 " " " superior white	13.00	"	"	13.00
25 boxes letter paper	.65	"	box	16.25
2 dozen boxes java powder, face	4.00	"	dozen....	8.00
6 " small dolls (muñecas)	1.20	"	"	7.00
56 boxes letter paper	.40	"	box	22.40
5 dozen cylinders, latest style	4.10	"	dozen....	20.50
3½ gross black thread	4.80	"	gross....	16.80
2 " " " anchor brand	3.50	"	"	7.20
2 dozen penknives, tin handles	1.00	"	dozen....	2.00
Total forward				$3193.09
22				
Bro't forward				$3193.09
5 dozen penknives, double edge	$3.00	per	dozen....	$15.00
15 " copper thimbles	1.00	"	"	15.00
8 " bottles of Florida water, 2nd class.	1.20	"	"	9.60
10 small boxes sealing wax	.65	"	box	6.50
5 dozen table knives	2.25	"	dozen....	11.25
25 boxes sewing needles, 1,000 to the box	.70	"	box	17.50
12000 beads, colored	.60	"	1,000....	7.20
30000 " black	.75	"	"	22.50
9½ dozen bone hair combs	1.10	"	dozen....	10.45
20,000 fine needles (Nos. 5 to 8)	.70	"	1,000....	14.00
2 gross Japanese shell buttons	1.40	"	gross....	2.80
1 " " " " small	1.00	"	"	1.00
5 " steel pens	2.50	"	"	12.50
32 dozen small padlocks	.80	"	dozen....	25.60
5 " patent padlocks	3.50	"	"	17.50
13 " box locks	1.00	"	"	13.00
15 " table locks	1.20	"	"	18.00
5 " " " copper	3.00	"	"	15.00
1½ " door locks	21.00	"	"	31.50
15 dozen large hinges	1.00	"	"	15.00
18 " hinges, small	.80	"	"	14.40
10 horse-clippers	2.00	each	....	20.00
4 dozen large drills	3.50	per	dozen....	14.00
5 " small "	1.20	"	"	6.00
15 " chisels	1.50	"	"	22.50
10 large European scissors	2.50	each	....	25.00
2 dozen can openers	1.80	per	dozen....	3.60
7 " iron compasses	2.40	"	"	17.20
9 " wood planes	2.50	"	"	27.00
2 " wooden faucets	2.50	"	"	5.00
1½ " lead faucets	4.60	"	"	6.90
7 dozen corkscrews	2.00	"	"	14.00
Total forward				$3649.59

23

Bro't forward				$3649.59
190 boxes of screws, at	$ .30	per box	....	$57.00
250 packages of nails	.40	" Pkg.	....	100.00
12 dozen cans carriage varnish	3.20	" dozen	....	38.40
10 boxes varnish for ordinary wood	2.00	" "	....	20.00
50 packages blue powder	.10	" pkag.	....	5.00
20 " green "	.30	" "	....	6.00
30 " yellow "	.30	" "	....	9.00
35 " red "	.30	" "	....	10.50
40 small black patent boxes	.40	each	....	16.00
22 boxes, carmine	.40	per box	....	8.80
25 boxes, vermillion	.80	" "	....	20.00
15 cans red filler	2.20	" can	....	33.00
4 dozen bits	5.75	per dozen	....	23.00
2 " stirrups	2.60	" "	....	5.20
5 " chains for horses	2.50	" "	....	12.50
2½ " " " dogs	2.25	" "	....	5.62 4/8
7½ " bolts	2.10	" "	....	15.75
54 lbs. solder	.25	" lb.	....	13.50
5 cans, spirits of turpentine	8.75	" can	....	43.75
3 " linseed oil	9.25	" "	....	27.75
10 " tar solution (alquitran)	3.00	" "	....	30.00
5½ dozen galvanized iron buckets	6.00	" dozen	....	33.00
4½ " shovels	7.50	" "	....	33.75
2 barrels gypsum	8.50	" barrel	....	17.00
6 " cement	7.50	" "	....	45.00
8 dozen "balance" 2nd class	6.50	" dozen	....	52.00
4 " " 1st class	7.00	" "	....	28.00
5 bales sotanjon, 1 picul	17.50	" picul	....	87.50
10 cases of matches	58.00	" case	....	580.00
6 cases of soap, 622 cakes per case	35.00	" "	....	217.70
20 clay sugar receptacles	5.00	each	....	100.00
185 boxes of coal oil	3.40	per box	....	629.00
200 Angat plow points	80.	" 100	....	160.00
2 bales of tea	23.00	" bale	....	46.00
Total forward				$6179.31 4/8

24

Bro't forward				$6179.31 4/8
3 boxes, first class	$9.00	per box	....	$27.00
5 piculs carajays	10.50	per picul	....	52.50
3 " caoa, 1 picul 2nd class	11.00	" "	....	33.00
5½ sets of boxes	4.80	" set	....	26.88
4 piculs of nails	15.50	per picul	....	62.00
50 fine mats	1.40	each	....	70.00
2 boxes of gin	32.00	per box	....	64.00
20 boxes insular	1.40	" "	....	28.00
1000 packages Cigarettes, Insular	50.00	" 1,000	....	50.00
1500 " " "	36.00	" "	....	54.00
3500 large cups	5.00	" 100	....	175.00
320 small "	2.50	" "	....	80.00
250 table plates, cheap	16.50	" "	....	41.25
1200 " " ordinary quality	4.60	" "	....	55.20
200 china chamber pots	.20	each	....	40.00
18 presses	2.00	"	....	36.00
400 umbrellas, paper	31.00	per 100	....	124.00
5 boxes of candles	5.50	" box	....	27.50
7 " " " large	6.80	" "	....	47.60
4 " " " "	6.80	" "	....	27.20
5 " " " for carriages	5.50	" "	....	27.50
8 pairs carriage lamps	6.00	" pair	....	48.00
4 pieces black oil cloth	8.50	per piece	....	34.00
3 " colored " "	10.00	" "	....	30.00
45 yards, carriage lining	1.20	" yard	....	54.00
25 " red cloth	.60	" "	....	15.00
28 " blue "	.65	" "	....	18.20

29 " green cloth for carriages	.60	" "	....	17.40
45 " black cloth	1.00	" "	....	45.00
4 dozen water glasses	2.50	per dozen	....	10.00
5 " " " 2nd class	2.00	" "	....	10.00
Total forward				$7609.54 4/8
25				
Bro't forward				$7609.54 4/8
250 glasses for cocoanut oil lights, at	$10.00	per 100	....	$25.00
1200 small glasses	5.00	" "	....	60.00
1½ dozen table lamps	12.00	" dozen	....	18.00
1 dozen candlesticks	15.00	" "	....	15.00
7 lamps	4.20	each	....	29.40
1 dozen dishes, small	32.80	per dozen	....	32.80
16 " white plates	1.40	" "	....	22.40
12 " colored "	1.60	" "	....	19.20
3½ " coffee cups	3.50	" "	....	12.25
5 " chocolate cups	3.00	" "	....	15.00
2 " bottles cananga water	5.00	" "	....	10.00
2½ " " Florida water	5.50	" "	....	13.75
1½ " rose jars	17.50	" "	....	26.25
4 " " basins	5.60	" "	....	22.40
1 dozen tea pots	10.50	" "	....	10.50
1 " dishes	7.20	" "	....	7.20
1½ dozen coffee pots	9.50	" "	....	14.25
4 " china chamber pots	1.20	" "	....	4.80
12 " glasses	3.00	" "	....	36.00
6 clocks	8.00	each	....	48.00
8 small stoves	2.00	each	....	16.00
4 dozen water glasses, fine quality	6.00	per dozen	....	24.00
5 " " " gilded rims	2.10	" "	....	10.50
5 lamps	4.60	each	....	23.00
2 mechanical lamps	9.00	each	....	18.00
225 pairs slippers, men's	.75	per pair	....	168.75
240 " " women's	.50	" "	....	120.00
122 " " small	.35	" "	...	42.70
150 " " men's kid	1.25	" "	....	187.50
250 " " cork soles	1.00	" "	....	250.00
4 dozen slippers for women	28.00	" dozen	....	112.00
2 " mens shoes, black	45.00	" "	....	90.00
Total				$9114.19 4/8
26				
Bro't forward				$9114.19 4/8
1½ dozen slippers, white leather, at	$29.00	per dozen	....	43.50
1½ " shoes, La Campana	76.00	" "	....	114.00
25 pairs canvas blankets	2.20	per pair	....	55.00
575 fans, various classes	14.00	per 100	....	80.50
58 lbs. cotton thread, No. 20	1.35	per pound	....	78.30
40 " " " " 40	1.65	" "	....	66.00
256 " " " " 50 to 80	2.00	" "	....	512.00
62 pieces of heavy white cloth	5.75	per piece	....	356.50
45 " " " black "	6.60	" "	....	297.00
50 " " rough cloth	3.50	" "	....	175.00
65 " " " " wide	4.90	" "	....	318.50
132 " " blue striped cloth	2.30	" "	....	303.60
72 pieces fine Espaltero white cloth	8.00	" "	....	576.00
85 " striped skirt cloth	2.60	" "	....	221.00
190 yards skirt skill	.60	" yard	....	114.00
55 pieces striped cloth	2.40	per piece	....	132.00
205 " painted chita	1.95	" "	....	399.75
855 " calmanianes, first class	1.15	" "	....	983.25
500 " Iloilo sinamay	.75	" "	....	370.00
1100 " " " colored	.80	" "	....	880.00
11 " sinamay for skirt linings	34.00	" "	....	374.00
86 pieces " " " " colored	2.20	" "	....	189.20
70 " " " " " figured pink	2.30	" "	....	161.00

180 pieces sinamay for skirt linings, figured white	1.80	"	"	....	324.00
135 " of painted chita	2.00	"	"	....	270.00
985 yards figured cloth	.15	"	yard	....	147.75
1650 " " " pink	.15	"	"	....	247.50
820 pieces of sinamay, plain white	1.00	"	piece	....	820.00
860 " " " plaid	.85	"	"	....	731.00
60 sets of pink piña cloth	3.50	"	set	....	210.00
Total forward					$18664.54 4/8

27

Bro't forward					$18664.54 4/8
800 pieces of sinamay, first class, at	1.40	per	piece	....	1120.00
325 yards of black woolens	1.80	"	yard	....	585.00
525 " " " " Eagle brand	1.50	"	"	....	787.50
320 " " " " 2nd class	.60	"	"	....	196.80
615 " " woolens	1.60	"	"	....	984.00
82 pieces of striped drill	7.50	"	piece	....	615.00
41 " " " " white Rooster brd.	10.00	"	"	....	410.00
37½ drill, Heart brand	8.60	"	"	....	322.50
21½ " No. 3000	7.80	"	"	....	165.55
15 pieces of drill No. 5000	7.80	"	"	....	117.00
362½ yards of silk (tapis)	2.00	"	yard	....	725.00
206 yards " " first class	1.80	"	"	....	370.80
195 " lace, 2nd class	1.00	"	"	....	195.00
121 " colored silk, skirt	1.70	"	"	....	205.70
132 " " " "	1.12	"	"	....	148.40
21 pieces lipa cloth for shirting	21.00	"	piece	....	441.00
200 " colored jusi, for blouses	1.40	"	"	....	280.00
160 " jusi, white	1.30	"	"	....	208.00
23 " "Nunca vista," waists	1.20	"	"	....	27.60
220 " " figured white	1.50	"	"	....	330.00
425 yards plain, colored satin	.22 4/8	"	yard	....	95.62 4/8
510 " figured satin	.25	"	"	....	127.50
150 " curtain cloth	.42	"	"	....	63.00
36 pieces white cloth, Hongkong brand, No. 8	7.80	"	piece	....	280.80
46 " " " " " No. 9	9.00	"	"	....	409.00
56 " " " " " No. 7	6.60	"	"	....	369.60
21 " " " " " No. 6	6.20	"	"	....	130.20
30 " espertaro, "Señorita brand"	7.90	"	"	....	237.00
21 bales cloth, heavy	3.70	"	bale	....	77.70
30 " " " 2nd class	2.50	"	"	....	75.00
35 pieces silk lace, black	1.20	"	piece	....	42.00
26 " " " colored	1.30	"	"	....	33.80
Total forward					28740.62

28

Bro't forward					$28740.62
30 pieces black lace at	$2.00	per	piece	....	60.00
48 " cotton cloth	3.75	"	"	....	177.60
8 dozen large colored neckties	7.00	"	dozen	....	56.00
6 " small " "	3.70	"	"	....	22.20
9 " black neckties	4.00	"	"	....	36.00
21 " socks, white	2.55	"	"	....	53.55
25 " " " unbleached	2.75	"	"	....	68.75
15 " " " superior	3.15	"	"	....	47.25
14 " " black	3.25	"	"	....	45.50
17 " " white linen	4.50	"	"	....	76.80
16 " " black superior	5.00	"	"	....	80.00
14 " stockings, fancy	3.80	"	"	....	53.20
7 " " black	5.00	"	"	....	35.00
25 " " children's	.80	"	"	....	20.00
28½ dozen " " colored	1.00	"	"	....	28.00
40 pieces of wide colored ribbon	2.25	"	piece	....	90.00
60 " " narrow "	1.50	"	"	....	90.00

3 dozen heavy blankets	28.50	"	dozen	....	85.50
4 " " " wool, colored	18.75	"	"	....	75.00
3 " " " for horses	9.00	"	"	....	27.00
2½ " " " " " colored	19.00	"	"	....	47.50
21 " handkerchiefs, white linen	2.00	"	"	....	42.00
35 " " " in boxes	1.50	"	"	....	52.50
7 pieces of unbleached hemp cloth	7.75	"	piece	....	54.25
16 " " " " " 2nd class	3.25	"	"	....	52.00
162½ yards linen cloth	.45	"	yard	....	73.12 4/8
106 " " " drill	.95	"	"	....	100.70
115 " blue curtain cloth	.40	"	"	....	46.00
215 " cañamaso	.22½	"	"	....	48.37½
9 pieces tassels for tapis	4.50	"	piece	....	40.50
132 yards silk tape for tapis	.50	"	yard	....	66.00
Total forward					$30591.42

29

Bro't forward					$30591.42
8 dozen fascinators at	$7.75	per	dozen	....	60.00
2 " " colored	17.50	"	"	....	35.00
3 " " " wool	14.25	"	"	....	42.75
15 " satin handkerchiefs, embroidered	4.50	"	"	....	67.50
7 " " black	3.25	"	"	....	12.75
42 " " painted	1.70	"	"	....	71.40
64 " small handkerchiefs	.50	"	"	....	35.20
41 " combination "	1.60	"	"	....	65.60
32 " " " colored	1.80	"	"	....	57.60
4 " silk "	16.00	"	"	....	64.00
7 " " " "	6.00	"	"	....	42.00
35 pieces of white cambray, No. 28	1.80	"	piece	....	63.00
40 " " " " " 55	2.00	"	"	....	80.00
27 " " beatilla " 27	1.12½	"	"	....	30.37½
16 " " " " 32	1.50	"	"	....	24.00
84 " " " painted for shirts	1.00	"	"	....	84.00
55 " " " " " "	1.10	"	"	....	60.50
24 " black lace	1.12½	"	"	....	27.00
245 yards striped pink silk	.40	"	"	....	98.00
84 " silk veiling	1.05	"	"	....	88.20
12 pieces striped white cloth	.95	"	piece	....	11.40
28 dozen white undershirts, 2nd class	5.50	"	dozen	....	54.00
17 " " " 1st "	11.00	"	"	....	187.00
42 " " " unbleached	9.50	"	"	....	399.00
35 " " " " 2nd class	6.00	"	"	....	210.00
28 " undershirts	3.50	"	"	....	98.00
15 " " children's	2.75	"	"	....	41.25
18 " " striped	7.25	"	"	....	130.00
7½ " towels, colored	12.00	"	"	....	90.00
15 " "	4.00	"	"	....	60.00
18 " " white	6.00	"	"	....	108.00
22 " "	3.50	"	"	....	77.00
Total forward					$33266.44 4/8

30

Bro't forward					33266.44 4/8
13 pieces of cloth, "Carabao brand," at	$7.00	per	piece	....	91.00
35 " " " cotton	3.50	"	"	....	122.50
32 " " " white nansook	4.10	"	"	....	131.20
28 " " " " " 2nd class	3.30	"	"	....	92.40
92 dozen large white handkerchiefs	1.12½	"	dozen	....	103.50
104 " small "	.70	"	"	....	72.80
105 yards plain wide satin	.72	"	yard	....	75.60
388 " narrow "	.37	"	"	....	145.00
120 " black cloth	1.50	"	"	....	180.00
66 " plain satin	.70	"	"	....	46.20
105 " white flannel	.55	"	"	....	57.75
160 " striped colored flannel	.22½	"	"	....	36.00
324 " white flannel	.22½	"	"	....	72.90

56	" colored "	.17	"	"	....	9.80
1560	" " batangas	.10	"	"	....	156.00
84	" figured flannel	1.65	"	"	....	138.60
285	" flannel, 2nd class	.80	"	"	....	228.00
722	" striped flannel	.15	"	"	....	108.30
102½	" pique	.40	"	"	....	41.00
163	" "	.55	"	"	....	89.65
130	pieces broad lace	.50	"	piece	....	65.00
160	" narrow "	.35	"	"	....	56.00
65	" wide " colored	1.05	"	"	....	68.25
83	" plain lace	.60	"	"	....	49.80
212	" " " narrow	.40	"	"	....	84.80
40	" " " wide	3.25	"	"	....	130.00
60	" " " narrow	2.25	"	"	....	135.00
2	bales of pink cotton, No. 20	140.00	"	bale	....	280.00
2	" " " No. 22	147.50	"	"	....	295.00
3	" " " No. 24	155.00	"	"	....	465.00
6½	" " " No. 30	190.00	"	"	....	1235.00
4	" " " No. 30, 2nd class	170.00	"	"	....	680.00
	Total forward					$38802.99 4/8

31

	Bro't forward					$38802.99 4/8
5	bales of cotton, No. 40 at	$210.00	per	bale	....	1050.00
4	" " " " 2nd class	190.00	"	"	....	770.00
5½	" " " No. 22, yellow	105.00	"	"	....	577.50
3	" " " " 40	110.00	"	"	....	330.00
3	" " " " 22, green	100.00	"	"	....	300.00
2	" " " " 40	110.00	"	"	....	220.00
1	" " " " 22 blue	110.00	"	"	....	110.00
1½	" " " " 40	115.00	"	"	....	172.50
5½	" " " " unbleached No. 10	165.00	"	"	....	907.50
3	" " " " 32	210.00	"	"	....	630.00
2	" " " " 34	220.00	"	"	....	440.00
3	" " " 50 white	290.00	"	"	....	870.00
2	" " " 24	260.00	"	"	....	520.00
2½	" " " 60	300.00	"	"	....	750.00
3	" " " 32	265.00	"	"	....	795.00
3	" " " 40	285.00	"	"	....	855.00
18	sewing machines	23.50	"	"	....	423.00
	Spanish and American banknotes					3200.00
	Mexican silver					2250.00
	Warehouse, strong materials					3500.00
	Furniture					1000.00
	Total					$58,473.49 4/8

Manila, January 25, 1904.
(Signed) LUCINO A. CHANTANCO.

UNITED STATES OF AMERICA,
Philippine Islands:

I, Lucino Almeida Chan Tan-Co, a Chinaman, merchant and resident of the town of San Fernando, married, of age, with personal cedula no. 292069, issued at San Fernando, La Union, March 17th, 1903, do solemnly swear that the property enumerated in the foregoing list was in the camarin and store owned by me which were burnt in the evening of the first of March, 1903, the said
32 articles having also been destroyed during the fire, the total value of the same being the amount stated in the said list, to-wit, $58,473.49 4/8.

(Signed) LUCINO A. CHAN TAN-CO.

Subscribed and sworn to before me the undersigned notary, Estanislao Tomayo, by the deponent, Lucino Almeida Chan Tan-Co., a Christian Chinese.

San Fernando, Union, January, 27, 1904.

[NOTARY'S SEAL.]

(Signed) ESTANISLAO TOMAYO,
Notary Public ex-Officio, Clerk of the Court of First Instance of La Union.

33 THE UNITED STATES OF AMERICA,
Philippine Islands:

In the Court of First Instance for the Province of Union, Third Judicial District.

Civil Case, No. 286.

LUCINO ALMEIDA CHAN TANGCO Y ENRIQUE*t* LETE, Plaintiffs,
vs.
EDUARDO ABAROA, Defendant.

Honorable James C. Jenkins, Judge.

The above entitled case having been regularly set for trial, on this the tenth day of March, 1905, the following proceedings were had, to wit:

Mr. W. H. Lawrence, attorney at Law, Manila, P. I. and Mr. Valerio Fontanilla, attorney at law, San Fernando, Union Province, P. I. appeared on behalf of the plaintiffs, and Messrs. Kitchens & Moran, on behalf of the defendant, Mr. Kitchens of said firm being present at the trial.

Mr. LAWRENCE: Before going into the evidence of this case, I will ask the Court to rule on this plea of *res adjudicata*, filed by the defendant in this case, and in order to raise the point, I will introduce the decision of thi Court in criminal case No. 282, and the decision of the Supreme Court in said case. I respectfully ask that a certified copy of said decisions be made and attached to the record in this case. (Certified copies were allowed to be made by the parties and to be attached to the record in this case.)

34 Mr. KITCHENS: I respectfully ask the Court that before a ruling is made on the special plea of the defendant, that I be given an opportunity to present evidence in support of the same.

The decisions above referred to were now read to the Court.

The COURT: The special plea should be overruled. However, if there is no serious objection or trouble, it might be held a tentative ruling until the defense is reached.

Counsel for plaintiffs insisting upon a definite ruling at this time, the Court sustains the position of counsel for the plaintiffs and overrules the plea set up in the answer of the defendant in this case.

To this ruling of the Court exception was duly noted.

The regular interpreter for the Third Judicial District being incapacitated temporarily on account of illness, Mr. Diaz, of the firm of Campbell & Diaz, attorneys at law, Manila, was sworn as special interpreter, he being agreeable to all parties in interest.

LUCINO ALMEIDA CHAN TANGCO, a witness called on behalf of the plaintiff being duly sworn, testified as follows:

Direct examination by Mr. LAWRENCE:

Q. What is your name, age, residence and occupation?

A. Lucino Almeida Chan Tangco, resident of San Fernando, Province of Union, the plaintiff in this case, and am a merchant in this town.

Q. Who is the other plaintiff Enrique Lete?

A. He is my brother.

Q. Are you and your brother partners?

A. Yes, sir.

35 Q. Were you and your brother in partnership in business in March, 1903, in San Fernando?

A. Yes, sir.

Q. What property did the partnership own in San Fernando on the first of March, 1903?

A. All the property they have burned up.

Q. What did that property consist of?

A. Many things, clothing, valuable goods, and many kinds of dry goods.

Q. Did you and your brother also own the buildings in which these goods were burned?

A. Yes, sir.

Q. When was that building constructed?

A. On or about 1900.

Q. What did it cost you to construct it.

A. About $35,000, pesos.

Q. What was the stock of goods in the building at the time of the fire worth?

A. I was in Manila when it burned, but I sent a lot of goods to that building.

Q. When did you leave San Fernando before the fire.

A. More than two weeks before.

Q. What was the value of the stock in the store at the time you left San Fernando.

A. More than 20,000 pesos.

Q. When you say "pesos" do you mean Mexican or conant.

A. I mean Mexican.

Q. What was the value of the goods that you shipped from Manila to your store before the fire.

A. More than 24,000 pesos.

Q. On what date were those shipped?

36 A. On or about February 20, 1903.

Q. What did you ship them on?

A. On the steamer "Bunyan."

Q. Whom did you leave in charge of your store while you were in Manila?

A. Sim Guangco.

Q. Was there any furniture in the building that was burned.

A. Yes, sir, and it all burned up.

Q. Whom did it belong to?

A. It was ours.

Q. What was the value of it?

A. I cannot calculate.

Q. Can you estimate approximately what you think it was worth at that time?

A. If you mean by furniture the apparatus, chairs and everything, the approximate value is more than 1,000 pesos.

Cross-examination by Mr. KITCHENS:

Q. Then you do not know for sure the exact value of the property contained in that camarin, are you?

A. I know about the value of the camarin but I am not very sure about the value of the goods; that I can only estimate. I can ascertain the value of the goods.

Q. What do you have to ascertain the value of the goods?

A. I know because I own those things.

Q. They were contained in the camarin, why do you have to guess as to their value.

A. Because all my property was contained in that camarin, and I know that that amounted to the amount which I have stated to you.

Q. Did you buy 24,000 pesos' worth of goods in Manila in February, 1903?

37 A. Yes, sir. Not only 24,000 pesos' worth, but I also sent goods by the same company's boat, the "Santiago," amounting to 9,000 pesos.

Q. Did you get a bill for the goods you sent on the boat "Bunyan?"

A. Yes, sir, I have the acknowledgment of the same.

Q. How many packages of goods were on the steamer "Bunyaan"?

A. I do not remember exactly, because it is a long time ago.

Q. What did the goods consist of?

A. Dry goods, cloth, the majority were dry goods.

Q. What was the minority?

A. Goods of other class, but the majority was cotton dry goods.

Q. How many pieces of cloth?

A. I cannot tell.

Q. Have you nothing by which you can explain the number of pieces.

A. I have all the acknowledgments—that is I had them, but they have been burned up, but I have a list which is in Lete's hands.

Q. Who made that out?

A. That was made in Manila.

Q. Were those goods shipped from Manila before February 20, 1903?

A. Yes, sir.
Q. What time of day.
A. It was made in several hours on the 20th, more or less.
Q. Had you ever shipped that many goods at any other time previous to the 20th of February, 1903.
A. Yes sir. Some times I ship that quantity and some times less.
Q. Every year?
38 A. Yes, sir.
Q. How many times a year.
A. Some time three times and twice some times; I have a correspondent in Manila.

Witness excused.

At the request of counsel for all parties, the Court ordered that all witnesses be put under the rule.

CHIN or SIM, GUANGCO, a witness called on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. LAWRENCE:

Q. You are an employee of Tana?

(Tana is the name by which Lucino Almeida Chan Tangco, one of the plaintiffs is known in this place.)

A. Yes, sir.
Q. What is your name.
A. Sin Guangco, I am 35 years old, and I live in San Fernando, Union Province.
Q. Were you in the employ of Tana in March, 1903.
A. Yes,sir.
Q. Were you in his employ when the camarin burned in 1903?
A. Yes, sir.
Q. Where was Tana at that time?
A. In Manila.
Q. What did Tana go to Manila for?
A. He went to purchase some goods.
A. Did any of the goods arrive in San Fernando before the fire?
A. Yes, sir.
Q. By what steamer?
A. "Bunyan."
Q. When did that steamer arrive here?
39 A. On or about the 22nd or 23rd day of February, 1903. I do not remember the hour.
Q. Are you sure it was before the fire?
A. Yes, sir, a week before the fire.
Q. Where did you put the goods that came on the Buyan?
A. I put them in the camarin.
Q. Were you in charge of the business of Tana while he was away?
A. Yes, sir.
Q. Were those goods in the camarin on the night of the fire?

A. Yes, sir, all of them.
Q. Were they burned?
A. Yes, sir, all of them.
Q. Do you know what the value was of the stock in the store before these goods arrived on the Bunyan?
A. According to my calculation, more or less than 20,000 pesos, Mexican.
Q. And what do you calculate the value of the goods that came on the Bunyan?
A. More than 24,000 and all of the goods were packed up in fifty packages or boxes.
Q. Did you keep at that time a book showing what property there was in the store?
A. Yes, sir.
Q. Was there any money in the store on the night of the fire?
A. Yes, sir.
Q. Was it destroyed?
A. Yes, sir.
Q. How much was there?
A. 3200 pesos, consisting of paper money; 2250 was silver. There was some cents, but I do not remember how many. The paper money was American and the silver was Mexican.
40 Q. Did you say 3200 pesos, money—do you mean 3200 pesos Mexican, and if so what was the value of the paper money?
A. I said 3200 pesos in paper money, and 2250 pesos in silver.
Q. What was the value of the paper money in Mexican?
A. 1600 pesos, gold.
Q. Were you in charge of this money.
A. There were two that had the keys to the box. I had charge.
Q. And whom did that money belong to?
A. It belonged to Tana.

Cross-examination by Mr. KITCHENS:

Q. You say you had a key to the box?
A. The key was in possession of another man.
Q. What other man?
A Tip Tan (?)
Q. Where was he at that time?
A. In the camarin.
Q. In the same camarin?
A. Yes, sir.
Q. What kind of box was that?
A. One box, common, made of wood, and one box made of iron.
Q. A flat top iron box?
A. It was a square box.
Q. Could you lift the box up?
A. Yes, sir.
Q. With one hand?
A. No, sir.
Q. With both hands?

A. No, sir, it was too heavy.
Q. Why did you just now state that you could lift it up with one hand?
A. As you opened the lid up.
Q. Were you there in the camarin there on the night of
41 the first of March, 1903?
A. Yes, sir.
Q. Was the man who had the key there in the camarin there also?
A. Yes, sir.
Q. Do you know why he did not get the money out of those boxes?
A. He could not get it because the fire was too large.
Q. Was there a big fire where you sleeping in the room?
A. When I waked up the fire was already very large.
Q. All the house was in flames?
A. Yes, sir, the whole top of the house.
Q. All of the top?
A. As it commenced to smoke I could not see the whole.
Q. How came you to wake up?
A. I heard a woman cry.
Q. Was that the first you heard?
A. Yes, sir.

Witness excused.

TIP CHAN, (before referred to by previous witness and written by stenographer as Tip Tan) a witness called on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct-examination by Mr. LAWRENCE:

Q. What is your name?
A. Tip Chan.
Q. How old are you, where do you live, and what is your occupation?
A. I live in San Fernando, Union, am 20 years old, and am a shop keeper.
Q. Whose shop keeper are you?
A. For Tana; I keep the key.
Q. Were you shopkeeper for Tana when the camarin burned?
A. Yes, sir.
42 Q. Do you know how much money there was in that box that night?
A. Yes, sir.
Q. Please state how much?
A. $1600 pesos, gold, paper money, and 2250 pesos, in Mexican silver, without accounting for the small pieces of money.
Q. Was that money saved or destroyed?
A. It was destroyed.
Q. Did you find the box after the fire?
A. I saw them?
A. Did you open them?
A. Yes, sir, we opened the box but the paper had burned.

Q. What shape was the silver in?
A. In a wooden box.
Q. Did you find any of the silver damaged.
A. Yes, sir.
Q. How much did you save?
A. We found a s-all quantity.
Q. What do you think it was worth, what you found?
A. About 1,000 pesos.
Q. You could sell what you found for 1,000 pesos, you think?
A. I think so, because it was all melted up.
Q. What do you think Tana could have sold that lump of silver for?
A. About 950 pesos.
Q. Did you keep books for Tana at that time?
A. No, sir.
Q. Were you acquainted with the goods in the store?
A. Yes, sir.
Q. Do you know what the value of the goods in the store was on the night of the fire?
A. I could not calculate; the stock was large; there were lots of goods there.
43 Q. Were the goods there that had just come from Manila a little while before?
A. Yes, sir.
Q. What steamer did they come on?
A. The Bunyan and Santiago.
Q. Did the Santiago come here before the fire?
A. Yes, sir.
Q. Were the goods from the Santiago in the store at the time of the fire?
A. Yes, sir.
Q. Do you know what was the value of the cargo of the Santiago?
A. I do not know, but it was less than the Bunyan.
Q. Was all the property in the camarin destroyed by the fire?
A. Yes, sir.
Q. Was there not anything saved at all?
A. No, sir, it was a total loss.

Cross-examination by Mr. KITCHENS:

Q. Do you know why none of it was saved?
A. Yes, sir, because the fire had lasted but a very few moments.
Q. The house had a tin roof, did it not.
A. Yes, sir, on the outside; on the inside it was wooden.
Q. Did you make any attempt to save any of that property?
A. Yes, sir.
Q. And you did not save a thing?
A. No, sir, not a thing.
Q. How many rooms did that house have?
A. Two rooms.
Q. There were goods in both rooms?
A. In one only; in the other not.

Q. Were you in the one which had the goods in or the other one?
A. I was living where the goods were.

Witness excused.

44 BARTOLA MAGLAYA, a witness called on behalf of the plaintiffs, being first duly sworn, testifies as follows:

Direct examination by Mr. LAWRENCE:

Q. What is your name, age, residence and occupation?
A. Bartola Maglaya, 29 years old, resident of San Fernando, Union, and am the wife of Tana.
Q. How long have you been married to Tana?
A. About six years.
Q. Did you live there in Tana's camarin at the time it was burned?
A. Yes, sir.
Q. Were you sleeping in the camarin that night?
A. Yes, sir.
Q. What time did you go to bed?
A. About ten o'clock that night.
Q. Who was with you?
A. Agustina Pilida.
Q. Anybody else?
A. And two children.
Q. Was there another woman with you besides Agustina?
A. Yes, sir. Maria Manogdo.
Q. In what part of the camarin was your sleeping room in?
A. On the north east part of the camarin.
A. That camarin is on the corner of Calle Principal and Sampolac?
A. Yes, sir.
Q. On what side of Calle Principal?
A. It is on the corner of calle Sampolac?
A. *On what side of Calle Principal?*
A. *It is on the corner of calle Sampolac.*
Q. Is it on the north side?
A. Yes, sir.
Q. Is calle Sampolac on the east side?
45 A. Calle Sampolac is on the east.
Q. On which side is Calle Sampolac?
A. On the north; the house is on the northeast corner of the street.
Q. Did the camarin have more that one floor?
A. No, sir, just one room.
Q. What time did you first wake after you went to bed that night?
A. I woke up when my children woke up.
A. What did you see when you woke up?
A. I saw the roof of the house being burned up.
Q. Was that fire in your room?
A. Yes, sir. On top.
Q. And in what part of the top of the roof?
A. On the very cornery of the northeast corner of the room.
A. Who woke up first, you or the other women?

A. The boy woke up first.
Q. And which woman woke up first?
A. I did.
Q. How large was the fire when you first saw it?
A. About as big as a regular basket.
Q. When you went to bed that night, was there any fire in the room for cooking or ironing?
A. No, sir, except a small light made of cocoanut oil.
Q. What kind of light was that?
A. A cocoanut oil light.
Q. In what part of the room was that?
A. The light was on my side.
Q. Was it on the floor, or shelf, or where was it?
A. The light was on the top of a small table.
46 Q. Was there any other light in the room except that one?
A. That was all.
Q. When you woke up and saw the fire was that light still in the same place?
A. Yes, sir.
Q. Was it still burning?
A. Yes, sir.
Q. What did you do when you saw the fire?
A. I cried everybody to wake up because the house was on fire.
Q. Did anybody come in answer to your cry?
A. Yes, sir.
Q. And who were the first persons that came into the room?
A. Tua and Tiana.

Cross-examination by Mr. KITCHENS:

Q. How did you get out of the room?
A. I cam- out of the room by going on the west side of the room.
Q. Was there a door on the east side leading into calle Principal?
A. Yes, sir.
Q. Was that door opened at any time?
A. No, sir.
Q. You say you had the lamp by your side where you were sleeping?
A. Yes, sir, but it was on the top of the table.
Q. Do you use a mosquito net?
A. Yes, sir.
Q. Was that lamp near to the net?
A. No, sir.
Q. About how far away was it.
A. A little bit; about two feet. (Witness indicates.)
Q. Did you make your escape immediately?
A. I first woke up the children and my companions.
Q. Did you return to the room after you went out?
47 A. No, sir, we could not enter because it was impossible.
Q. How many rooms are there in the house?
A. There is but one room; the other compartment is used for the store.
Q. The goods and money were kept in the store part of the room.

A. Yes, sir, the money was in the box.
Q. State whether you had a conversation with Aurolio Siblan de Estrino (?) and others, stating that that fire started or originated rom the lamp in your room and it was your fault and that probably Tana would scold you on his return from Manila?
A. No, sir, I did not say a word.
Q. Well, it is true, is it not, that the fire originated from that amp?
A. No, sir, it is not.
Q. Did you ever have a conversation with any person about how hat fire originated there?
A. No, sir, because the man in charge of the caramin forbade us bout talking about the matter.
Q. Do you know why they forbade you to talk about the matter?
A. Because they saw a man who burned the house and they did ot want to speak about the matter until Tana got back.
Q. Nothing was said until Tana got back?
A. No, sir.
Q. Were all the persons in your room sleeping side by side?
A. Yes, sir. We had our beds in one line.
Q. In what part of the room were you sleeping?
A. In the southern part of the room.
Q. About how large is the room?
A. About 35 feet long and ten feet wide.
Q. Do you know who woke up your companions where the goods ere?
A. Yes, sir.
Q. Who?
A. Tua and Tiana, were the first persons we met when our oom was burning; we met them as we were going out.
Q. Had Tua and Tiana got inside of the sto-e room?
A. They came into my room.
Q. How long did you remain in your room after you saw the fire?
A. About five minutes.
Q. And when you left the room the fire was about as large as a asket.
A. The first time I saw the fire it was as big as a basket but after waked all the persons in that room, then the fire was coming larger nd larger and it was very big.
Q. How large had it grown?
A. When we left the room the fire was very big.
Q. How long did Tua and Tiano remain in your room?
A. They just came in and left the room.
Q. Did they say anything to you?
A. They asked me where was the fire.
Q. Did they ask you where the fire was?
A. Yes, sir.
Q. Did you tell them?
A. Yes, sir. I told them.
Q. What did you tell them?
A. They asked me where the fire began and I said on the top of he house.

Q. They were already inside of the room?
A. Yes, sir.

Redirect examination by Mr. LAWRENCE:

Q. Did you get your clothes or skin burned that night?
A. No, sir.
Q. Did any of your companions get burned?
49 A. No, sir.
Q. Was your mosquito netting blazing when you woke up?
A. No, sir.
Q. About how high is the ceiling of that roof?
A. About fourteen feet high (Witness indicates the same in heighth as the Court room).
Q. How high was the fire when you first saw it?
A. It was high because the fire began on the top of the house.
Q. On what was this lamp you mentioned, and about how high?
A. About the same as this table. (About three feet.)

By the COURT:

Q. How do you know that the fire did not originate from the lamp, but that it began on the top of the house?
A. Because the lamp was very far from the fire.
Q. Was the lamp still burning when you left the room?
A. Yes, sir.

By Mr. KITCHENS:

Q. You say the top of the room was about as high as the ceiling in this court room?
A. Yes, sir.

Witness excused.

AGUSTIN APILADO, a witness called on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. LAWRENCE:

Q. What is your name, age residence and occupation?
A. Agustina Apilado, 23 years old, married, and a resident of San Fernando, Union Province.
Q. Do you know Bartola Maglaya, wife of Tana?
A. Yes, sir.
Q. Do you remember the night Tana's camarin burned?
[A. Yes, sir.]*
50 Q. Where did you sleep that night.
A. I slept in Tana's room.
Q. Who else slept in that room that night.
A. We were three.
Q. Who were they.
A. Bartola Maglaya, her mother and myself.
Q. Were Bartola's children with her?

[* Words enclosed in brackets erased in copy.]

A. Yes, sir.
Q. What time did you go to sleep that night?
A. About ten o'clock.
Q. When did you wake up?
A. About one o'clock.
Q. Who woke you up?
A. The cry of Bartola's boy woke up me and as we woke up we found the room was burning.
QQ. When you woke up where did you see the fire?
A. On the northeast top of the room.
Q. How big was the fire when you first saw it?
A. As big as a basket.
Q. Was there a lamp in the room that night?
A. Yes, sir.
Q. What kind of a lamp?
A. A cocoanut oil lamp, built up in the top and hanging in oil.
Q. Was that light burning when you woke up?
A. Yes, sir.
Q. How far from the fire, where you first saw it, was that light?
A. It was about eighteen feet. (Witness indicates.)
Q. When you woke up, what did you do?
A. We carried the children away.
Q. When they saw the fire did any of the women cry out?
51 A. Yes, sir.
Q. Did anybody come?
A. Yes, sir.
Q. Who came first?
A. Tue and Tiana.
Q. Are you related to Bartola?
A. She is only my friend.

Cross-examination by Mr. KITCHENS:

Q. You stated that Tua and Tiano came into the room where you were sleeping?
A. Yes, sir.
Q. How long did they remain in there?
A. They did not remain there long.
Q. What did they say, if anything?
A. Nothing.
Q. Did they not say a word?
A. They said some words. We came out of the room almost the same time.
Q. Did they try to do anything or did you do anything?
A. No, sir.
Q. Did you or any of your companions try to put out that fire?
A. We did, but we could not succeed.
Q. How long did you try?
A. About less than a half an hour.
Q. Were you inside of the room at the time you were trying to put out the fire?
A. Yes, sir.

Q. All three of you?
A. Yes, sir.
Q. Now is it not true that your mosquito burned, or something in the room, or that glass of cocoanut oil turned over and the fire began there and you tried to put that out?
52 A. No, sir.
Q. How long had the fire been when Tua and Tiana came in?
A. A few moments.
Q. How long was the fire?
A. As big as a basket.
Q. Just about the size of the basket when they came into the room?
A. Yes, sir, on the top of the room.
Q. They did not try to put out the fire?
A. They did.
Q. How long did they try?
A. Less than one hour.
Q. Were inside the room all the time?
A. As the fire growed larger and larger they came out.
Q. Did they try to put out the fire as they came out of the room?
A. Yes, sir, but they did not succeed in doing so.
Q. About how long did they fight the fire inside of the room, and try to put it out?
A. Less than one half hour.
Q. About how many minutes, more or less?
A. I cannot tell.
Q. How far do you think you could walk within the time that they were trying to put out the fire?
A. About one fourth of a mile.
Q. About as long as it woul- take you to walk a quarter of a mile?
A. It is not very far.
Q. Did you ever have a conversation with any person as to how that fire originated before testifying in this case?
A. No, sir.
Q. You never did tell anybody about how that fire originated and where it originated?
53 A. I did not tell anything.
Q. How came you not to tell somebody?
A. Because Tana was in Manila.
Q. You did not tell anybody about it until Tana came back from Manila?
A. Yes, sir.
Q. That was when you told about it, was it?
A. Yes, sir.

By Mr. LAWRENCE:

Q. How many hours do you think it is since this gentleman began asking you questions?
A. About one half hour.

Witness excused.

PEDRO BALDES, a witness called on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. LAWRENCE:

Q. What is your name, age, residence and occupation?
A. Pedro Baldez, 45 years of age, baker, and resident of San Fernando, Union.
Q. What was your business in March, 1903?
A. I was a baker.
Q. Were you working?
A. I worked in the house of Florencio Baltazar (?).
Q. Where is that house?
A. On the Escolta, here in San Fernando.
Q. Where was your own house?
A. Down on the beach.
Q. Did you work nights or days?
A. Nights.
Q. Do you remember the night that Tana's camarin burned?
A. Yes, sir.
54 Q. Did you work that night.
A. Yes, sir.
Q. What time did you finish your work that night.
A. At about two o'clock.
Q. Where did you go when you finished your work?
A. I went back to my house.
Q. On what street did you go on from the bakery to your house?
A. On the street which goes to the west.
Q. Do you know the name of that street?
A. I do not know.
Q. Do you know where Tana's camarin is?
A. Yes, sir.
Q. Did you go past Tana's camarin that night.
A. Yes, sir.
Q. Do you know where Aduardo Aboroa's store is?
A. Yes, sir.
Q. Did you pass by that night?
A. Yes, sir.
Q. Did you pass by Eduardo's or Tana's.
A. I passed Eduardo's store first.
Q. Was anybody with you when you went home that night?
A. Yes, sir.
Q. Who was with you?
A. Sinforoso.
Q. Did you and Sinforoso meet anybody between Eduardo's store and Tana's.
A. Yes, sir.
Q. Who?
A. Eduardo.
Q. How long have you known Eduardo?
A. More than ten years.
Q. How close did he pass to you that night?

A. About one braza.

Q. Was that a bright night?

55 A. It was dark but there were stars out.

Q. Could you see Eduardo's face?

A. Yes, sir.

Q. Did you speak to Aduardo or he to you?

A. No, sir.

Q. Why did you not speak to each other if you have known him so long.

A. Because I was in haste that night. I was informed that my boy was very ill.

Q. Which way was Eduardo going?

A. Going to the south.

Q. Would that direction take his to his own store?

A. Yes, sir.

Q. How was he going, slow or fast?

A. Fast.

Q. Did you see any other people on the street on your way home?

A. Yes, sir, but on the western part of the town.

Q. Did you hear anything after you passed Tana's store?

A. Yes, sir, I heard two men.

Q. What did you hear.

A. I heard two Chinamen speaking Chinese words.

Q. When did you first hear of the fire that night.

A. After I reached the old store on the western part of the town I heard something about the fire.

Q. Did you go back to see where the fire was?

A. No, sir.

Q. On your way home, could you see any light from the fire?

A. Yes, sir.

Q. Where is this old store—how far is it from Tana's camarin?

A. About thirty brazas.

Q. Where were you when you heard two men talking Chinese?

56 A. In front of Tana's store. I was in front of that store of Tana's on the west side.

Q. Did you see the men?

A. Yes, sir.

Q. Do you know who they we-e?

A. No, sir.

Q. Were they in the street?

A. They were within the inside of the fence of Tana.

Cross-examination by Mr. KITCHENS:

Q. Your companion on that night was Sinforoso Tadipa?

A. Yes, sir.

Q. You say you left your place of business about two o'clock?

A. Yes, sir.

Q. Is it not a fact that the house of Eduardo is in front of where your place of business was?

A. No, sir, there is a little difference.

Q. Well, it is a very little is it not?
A. Yes, sir.
Q. What time were you notified your boy was sick?
A. The man that was sent for me, came to my place about ten o'clock that night.
Q. Did he remain there till 2?
A. He staid and waited for me.
Q. That was about four hours?
A. About that time.
Q. Did he return with you?
A. Yes, sir.
Q. Did you ever bake bread that late on any other night?
A. Some times I slept in my bakery.
Q. What was you doing in your bakery on that night?
57 A. I was baking bread.
Q. Did you bake until 2 o'clock?
A. Yes, sir.
Q. Did you ever bake bread until 2 o'clock on any other night?
A. Yes, sir.
Q. Every night?
A. No, sir.
Q. About how often—on-e a week?
A. Two or three times.
Q. About what time do you generally fibish your customary baking?
A. From two to three. Sometimes I remain there longer.
Q. Were you notified that your baby was very sick?
A. Yes, sir.
Q. How came you then to wait four hours before going to see it?
A. Because I had begun to bake and I did not want to lose that flour.
Q. Does Sinforoso Tadipa live in your house?
A. He is my neighbor.
Q. What were those two Chinamen doing inside of the yard of Tana's house when you saw them.
A. They were talking.
Q. Were they standing still?
A. Yes, sir, they were standing up.
Q. How came you to notice them?
A. Because I passed by that way.
Q. Did you see anything else when you passed by?
A. No, sir.
Q. Did you see a light or anything about the house?
A. No, sir.
Q. You stated that when you got near the old store you heard something about the fire—what was it that you heard?
A. I heard a voice saying "Fire!! Fire!!"
58 Q. Did you not return?
A. I did not.
Q. Did your companion return?
A. He went back with me.

Q. Did you stop and look at the fire?
A. Yes, sir.
Q. How long did you stop there?
A. About at least half an hour,—it was less than half an hour.
Q. You stood there and watched it did you.
A. Yes, sir.
Q. Just about 180 feet or thirty brazas from the place?
A. Yes, sir.
Q. Well, did you ever tell anybody about what you saw that night before testifying in this case?
A. No, sir.
Q. You never did tell anybody about it?
A. No, sir.
Q. Do you know how the plaintiff in this case came to know that you possessed this information that you have just given?
A. Yes, sir. I suppose that Tana heard from somebody that I knew something about the fire as I was baking pretty near that night, and so Tana told me that he wanted me for a witness?
Q. Did he write to you?
A. He did not.
Q. How did he tell you?
A. He sent for me.
Q. Who went after you?
A. One of his Chinese companions.
Q. Does that bakery belong to you?
A. No, sir.
59 Q. How far was Eduardo from his own store when you met him.
A. About ten brazas.
Q. About how far was he from the store of Tana?
A. More than twenty brazas.
Q. Was the camarin on fire when you passed by?
A. No, sir.
Q. Are you sure of that?
A. I am, but not quite.
Q. Why are you not sure?
A. I only noticed smoke.
Q. Did you notice the smoke when you passed by?
A. Yes, sir.
Q. What kind of smoke w— big smoke or little?
A. It looked like the smoke of a chimney.
Q. Coming out of the window was it?
A. On the roof.
Q. Did you stop to investigate that?
A. No, sir.
Q. What did you think it was.
A. I thought it was the Chinamen cooking.
Q. You do not know whether that was the place where they were accustomed to cook.
A. I do not know.

Q. Was the smoke coming up through the roof?
A. Yes, sir.
Q. What made you think they were cooking?
A. As I did not see any fire.

By Mr. LAWRENCE: How long do you think this gentleman has been asking you questions?
A. Less than one minute, I guess?

By the COURT: Which side of the street was Eduardo on
60 when you met him? Was it on the same side of the camarin, or on the other side?
A. On the west side of the street.
Q. On the same side of the street to the camarin, or was it on the other side.
A. It was on the same side.
Q. How far from Eduardo were the two Chinese that you heard talking?
A. They were far away from Eduardo.
Q. How far.
A. About forty brazas, according to my calculation.

By Mr. LAWRENCE:

Q. It was after you turned the corner that you saw the Chinamen talking, was it not?
A. Yes, sir.

Witness excused.
Court adjourned until this P. M.

March 10, 1905, Afternoon Session.

TAN CHUANCO, a witness called on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. LAWRENCE:

Q. What is your name?
A. Tan Chuanco.
Q. Where do you live?
A. San Fernando, Union Province.
Q. How old are you?
A. 41 years of age.
Q. How many years have you lived in the Philippine Islands?
A. More than ten years.
Q. How long have you lived in this province?
A. About ten years.
Q. Do you know the Chinaman called Tana?
61 A. Yes, sir.
Q. Do you know his brother, Enrique Lete?
A. Yes, sir.
Q. Do you know Eduardo Aboroa?
A. Yes, sir.

Q. How long have you known these three men?
A. I have known them for a long time.
Q. Do you know what the relations have been between them—whether friendly or otherwise—between Tana and his brother and Eduardo?
A. Tana and Eduardo appear to be friends, but Eugenio did not like Enrique.
Q. Who is Eugenio?
A. Eduardo's brother.
Q. What are the relations between Eduardo and Enrique—what were they at that time?
A. They were enemies.
Q. How long have they been enemies?
A. More or less three years.

Cross-examination by Mr. KITCHENS:

Q. Have you lived in this town for ten years?
A. I lived about three years in this town?
Q. You came here after the store of Tana was burned?
A. No, sir.
Q. You stated in your first testimony that Eduardo and Tana were friends, did you not, and that Enrique and Eduardo were enemies?
A. Yes, sir.
Q. Is that all you know about this case?
A. Yes, sir.

Witness excused.

62 CHAN TENGCO, a witness called on behalf of the plaintiffs being first duly sworn, testified as follows:

Direct examination by Mr. LAWRENCE:

Q. What is your name, age, residence and occupation?
A. Chan Tengco, 27 years of age, cook, and resident of San Fernando, Union.
Q. How long have you lived in this province?
A. Twelve years.
Q. Do you know Tana?
A. Yes, sir.
Q. Do you know Enrique, Tana's brother?
A. Yes, sir, I staid with him.
Q. Do you know Eduardo Aboroa?
A. Yes, sir.
Q. How long have you known these three men?
A. I know them for a long time because we came from the same province in China.
Q. Since you have known them what have been the relations between Eduardo and the two plaintiffs?
A. I know that Tana and Eduardo used to be friends, but Eduardo was an enemy to Tana's brother, Enrique.
Q. How long were Enrique and Eduardo enemies?
A. More than ten years.

Q. Do you know what the trouble was about?
A. The cause of the antagonism between the two men was the business trouble they had.
Q. Was the feeling between Enrique and Eduardo strong?
A. Yes, sir. Because Eduardo was the oldest and always in competition with Enrique.

Cross-examination by Mr. KITCHENS:

Q. How do you know that?
63 A. I know that because I lived with Enrique.
Q. In Tana's house?
A. Yes, sir.
Q. You cooked for them?
A. Yes, sir.
Q. Did you get your information from him?
A. Yes, sir, they told me so.
Q. What did they tell you?
A. They said that Eduardo envied Enrique in his success.

Mr. KITCHENS: I move the court to strike from the record all the testimony of this witness, as he has just testified that he has acquired the information to which he has testified from other people, and that it is not of his own knowledge that he knows the facts about which he has testified.

Mr. LAWRENCE: I would like to have the right to question this witness before the motion of counsel for the defendant is acted upon.

Request of Mr. Lawrence granted.

By Mr. LAWRENCE:

Q. Did you ever talke with Eduardo about his feelings for Enrique?
A. No, sir.
Q. Do you know Eduardo well?
A. Yes, sir.
Q. Did Eduardo talk to you about Enrique?
A. No, sir.
Q. Do you know about the trouble between Eduardo and Enrique from anything else except what Enrique told you?
A. Yes, sir, I know.
Q. What else do you know besides what Enrique told you?
A. I know that Eduardo is an enemy to them.
Q. Where did you get that information except from Enrique?
64 A. I know that because I lived all the time with Enrique.

By Mr. KITCHENS:

Q. Where is Enrique now?
A. He is in Manila; he just came from China.
A. Do you know how long he was in China?
A. About four years.

Witness excused.

LIM CUINCO, a witness called on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. LAWRENCE:

Q. Please state your name, age, residence and occupation.
A. Lim Cuinco, 45 years of age, resident of Naguilian.
Q. How many years have you been in this province?
A. 22 years.
Q. Do you know Tana?
A. Yes, sir.
Q. Do you know his brother Enrique?
A. Yes, sir.
Q. Do you know Eduardo Aboroa?
A. Yes, sir.
Q. Can you tell us whether Eduardo has been a friend of Tana and Enrique since you have known them?
A. They are not friends.
Q. Are they enemies?
A. Yes, sir.
Q. How long have they been enemies?
A. More than ten years.
Q. What makes you think they are enemies?
A. Because I lived with Abaroa.
65 Q. Did Eduardo ever say anyt*y*ing about Enrique and Tana that made you think that — were not friends?
A. Yes, sir, he told me that antagonizm first began between them when they were dealing in tobacco.
Q. How long did you live with Eduardo?
A. More than ten years.
Q. When did you leave Eduardo's house?
A. About seven years ago.
Q. Were Eduardo and the plaintiffs enemies all the time that you lived in Eduado's house?
A. Yes, sir.
Q. Did Eduardo and the plaintiffs ever meet when you were present?
A. I do not understand.
Q. Did you ever see Eduardo visit Enrique, talking together?
A. No, sir.
Q. Did Enrique and Eduardo come from the same village in China?
A. Yes, sir.
Q. Do you know anything else about the feeling between them that you have not told us?
A. I know that only because Eduardo told me all about his troubles when I lived with him.

Cross-examination by Mr. KITCHENS:

Q. You say that Eduardo lived with you seven years ago?
A. I left for Eduardo about seven years ago.
Q. Why did you leave Eduardo?

A. I did not like him.
Q. You do not like him now do you?
A. No, sir.
66 Q. Why.
A. He made something wrong with me.
Q. He accused you of stealing something from him, did he not?
A. No, sir.
Q. What did he do to you, that makes you say that he made you wrong?
A. Nothing.
Q. Did he not tell you anything or do anything to you?
A. He owed me more than 260 pesos for salary and as I wanted to collect that salary he said that I stole something in the store.
Q. Do you know where Enrique is now?
A. He is not in town now.
Q. Where is he now?
A. In Manila.
Q. Do you know how long it has been since he was in San Fernando?
A. He left for his town.
A. In China?
A. Yes, sir.

By the COURT:

Q. You said that Eduardo during the time that you lived with him told you all about his trouble; can you tell anything more that he told you—what did he tell you, if anything?
A. When I lived with Eduardo he told me that as he did not like Enrique he would find some man to burn Enrique's place.
Q. How long ago was that?
A. During the Spanish government.
Q. How many years ago?
A. More than ten years ago.
67 Q. Where did you and Eduardo live at that time?
A. In his house.
Q. Where was his house?
A. In this town on this very street. He also told me that he wanted to have Enrique's store in Naguilian to be burned up.
Q. He did not tell you anything about the plaintiff Tana?
A. No, sir.

Witness excused.

SINFOROSO TADIPA, a witness called on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. LAWRENCE:

Q. Please state your name, age, residence and occupation?
A. Sinforoso Tadipa, 30 years old, laborer, resident of San Fernando, Union Province.
Q. Do you know Pedro Baldes?
A. Yes, sir.

Q. Do you remember one night when Pedro Baldes' child was sick and you went to the bakery to get him?
A. Yes, sir.
Q. What time did you arrive at the bakery?
A. About ten o'clock.
Q. Did Pedro leave the bakery and go home?
A. Yes, sir, as soon as he got through with his baking.
Q. Did you go home with him?
A. Yes, sir.
Q. What time did you leave the bakery?
A. According to my calculation about one o'clock.
Q. Where is the bakery?
A. In Florencio's place.
Q. When you left the bakery on going home, what street did you pass through?
68 A. On the street which goes to the west.
Q. Do you know the name of the street?
A. No, sir.
Q. Well, do you know where Tana's store is?
A. Yes, sir.
Q. Do you know where Eduardo Aboroa has his store?
A. Yes, sir.
Q. Are those stores on the street you went home on?
A. Yes, sir.
Q. Did you pass by both stores that night?
A. Yes, sir.
Q. Did you meet anybody on that street on your way home?
A. Yes, sir, one person.
Q. Who was that?
A. Eduardo Aboroa.
Q. Do you know Eduardo?
A. Yes, sir.
Q. How long have you known him?
A. I know him for long standing. More than two years I guess.
Q. Did you see him that night so you could recognize him?
A. Yes, sir, he was close to us.
Q. Which way was Eduardo going?
A. Going toward the south.
Q. On what part of the street did you meet him?
A. Just in front of the ex-presidente's house.
Q. Was the house between Eduardo's store and Tana's store?
A. Yes, sir.
Q. How was Eduardo walking?
A. Fast.
Q. Did you see anybody else on your way home?
A. Yes, sir, we saw some persons in the yard of Tana.
Q. Did you turn the corner of Tana's place into the other street?
69 A. Yes, sir.

Cross-examination by Mr. KITCHENS:

Q. When you got to the corner did you turn to the left or to the right or go straight on?
A. Which corner?
A. Wh-re the shote-house is?
A. We turned to the left.
Q. What were those chinamen doing there?
A. I cannot tell you; I only heard a talking.
Q. Talking in loud voice?
A. Regular.
Q. You could hear them out there in the street, could you?
A. Yes, sir.
Q. While passing by there, did you notice anything else?
A. No, sir, nothing unusual.
Q. Now what was your business in those days?
A. I was a laborer.
Q. Were you not a cochero or driver on a cart hauling coffee, etc. for Tana?
A. No, sir.
Q. Did you ever at any time haul any coffee for Tana?

Mr. LAWRENCE: I do not think this is material, and if Counsel desires it, I will admit that he has hauled coffee for Tana.

Q. How came you to go to the house of Baldes that night?
A. I was asked by Pedro's wife to go and see him because his child was sick.
Q. Very sick?
A. Yes, sir.
Q. Were you staying there in the house of Pedro when his
70 wife asked you to go to him?
A. Yes, sir.
Q. What were you doing there?
A. I went there to hold them company.

Witness excused.

CHAN QUIETCO, a witness called on behalf of the plaintiffs being first duly sworn, testified as follows:

Direct examination by Mr. LAWRENCE:

Mr. Nicolas Lete, 45 years old, of San Fernando Union, was sworn as special interpreter at this time.

Q. What is your name, age, residence and occupation?
A. Chan Quietco, 33 years old, employee, and resident of San Fernando, Union.
Q. Are you an employee of Tana?
A. Yes, sir.
Q. Were you in Tana's employ at the time the camarin burned?
A. Yes, sir.
Q. Where did you sleep the night the camarin burned?
A. I was sleeping in the west part of the camarin?

Q. Did you sleep in the same camarin that was burned?
A. No, sir, on the other house.
Q. How far apart are the two houses?
A. About ten brazas.
Q. Does the camarin that you were sleeping in, join on the side, or is it behind that camarin?
A. It was behind the camarin which was built up.
Q. What time did you go to bed that night?
A. Before ten o'clock.
Q. Did you wake up during the night?
A. Yes, sir, I was awakened up by my companion.
71 Q. Who was with you that night?
A. Chan Toco.
Q. Is he an employee of Tana's too.
A. Yes, sir.
Q. What did you and Chan Toco do after you got up?
A. Chan Toco was wakened up because of the barking of a dog and he supposed that some ladrones were entering the house.
Q. What did Chan Toco do when you—what did you both do when you woke up?
A. When we woke up we saw a man on the street near the store.
Q. Where were you when you saw him?
A. We were there at the door of the fence.
Q. How could you get out of the gate?
A. As we heard the dog barking, we came out of the house and went to the gate.
Q. Wh-re was this man when you saw him?
A. He was on the top of the fence on the corner of the last store on that street.
Q. Where that man was on the fence, is that fence near the camarin?
A. Ye-, sir.
Q. How near.
A. About one vara.
Q. What part of the camarin was at that point—(counsel indicates to witness) was it on the side, the front of the camarin, or where?
A. It was on the north side of the camarin.
Q. Was it near you or far from the front of the camarin?
A. About four brazas from the front of the camarin.
Q. What was four brazas from the front of the camarin?
A. I meant the man I saw was four brazas from the front of the camarin.
72 Q. What did you do when you saw the man?
A. I saw Eduardo there.
Q. What did you do?
A. I called, "Eduardo" by name, and he jumped off on the fence and went away.
Q. Did he answer you?
A. No, sir.
Q. How far were you from Eduardo?

A. About four brazas.
Q. How long have you known Eduardo?
A. I have known him from childhood.
Q. Are you sure it was Eduardo that you saw that night?
A. Yes, sir.
Q. What did you and Chan Toco do when after Eduardo went away?
A. After we called Eduardo by his name and he ran away, we went to the camarin.
Q. To what camarin where you were sleeping in.
A. Yes, sir.
Q. Did you go to bed again?
A. No, sir.
Q. What did you do?
A. As soon as we entered the house we heard a voice giving the alarm saying that there was a fire.
Q. What did you do then.
A. We went out to where the fire was.
Q. Where was it?
A. On the store.
Q. In what room?
A. On the northeast corner room.
Q. Who was in the room at that time?
73 A. Agustina and Bartola.
Q. What were those women doing when you came into the room?
A. When we entered the room they were crying "Fire! Fire!"
Q. Did you try to put the fire out?
A. No, sir, because we could not reach the place where the fire was.
Q. In what part of the room was the fire in?
A. On the northeast corner of the room.
Q. Near the floor.
A. On the top.
Q. How big was the fire when you got there?
A. About one vara wide.
Q. If that is the camarin house on the front, and here is the general side, I want you to show me where you saw Eduardo?
A. Near the northeast corner.

(Mr. Lawrence stated that he would draw said map on substantial paper and mark same and attach to record showing location where said Eduardo was supposed to have been seen by said witness.)

Q. Now looking on this drawing, please indicate on the floor how far back from the front of the street you saw Aboroa that night?
A. About one vara.
Q. Where is the gate that you and your companion came out that night?
A. On the western side of the camarin.
Q. Where is the camarin that you slept in?
A. On the west side there, back from the street.

Q. How high was that fence?
A. About seven and a half feet.
74 Q. How far was it from the top of that fence to the edge of the roof of the camarin?
A. About one vara.
Q. Did many people come to see the fire?
A. Yes, sir; but the fire was already big.
Q. Did you see anything of Eduardo in the crowd.
A. No, sir, I did not see him.

Cross-examination by Mr. KITCHENS:

Q. Did you tell any of that large crowd assembled there that you had just seen Eduardo on the top of that fence?
A. I did not.
Q. Did you not have some suspicion having seen Eduardo on the fence?
A. No, sir.
Q. Did you see Eduardo while you were standing within the lot of Tana, or while you were standing within the gate?
A. When I was at the gate.
Q. Had you been out into the street before you came up to the gate?
A. I saw him when I went into the street.
Q. How long were you out in the street?
A. I did not stay there long.
Q. Had you gotten—— How did you get back into the camarin if you came out into the street.
A. I went back into the camarin by going through the same gate.
Q. Well that gate is on the principal street that runs here, is it not?
A. It is on the street which crosses the principal street.
Q. You did not get closer than four brazas to the man whom you saw on the fence?
75 A. Four brazas more or less.
Q. What did you do then?
A. I went into my bed.
Q. Did you go to sleep.
A. No, sir.
Q. How long did you remain in bed?
A. A few minutes.
Q. What did you do then?
A. Nothing.
Q. When you saw that person jump down off the fence that you say you saw, you went back to bed, did you?
A. Yes, sir.
Q. About how long did you remain in your bed?
A. A few minutes.
Q. How came you to get up?
A. I did not lie down.
Q. Did you not go to bed?
A. I did.

Q. What did you do?
A. I sat down on the front of my bed.
Q. What were you doing that for?
A. I was smoking a cigarette.
Q. Did you finish the cigarette.
A. I just lighted it.
Q. What did you do then?
A. Then I heard the voice.
Q. Then you went inside the camarin did you?
A. Yes, sir.
Q. You say you saw a little fire about a vara long?
A. When I entered the room I saw the fire about a vara long.
Q. How wide was it?
A. About a vara in diameter. It was about as big as a big basket.

76 Q. Did you do anything or try to do anything?
A. Yes, sir, I tried to do something, to put the fire out, but I could not reach it.
Q. With what did you try to put it out?
A. With water.
Q. Anybody else try to put it out?
A. Yes, sir, lots of them.
Q. Who were they?
A. Chan Toco, Chan Cuinco, and myself. We were the first persons who entered the room.
Q. Did you try to remove any of the effects in that building.
A. Yes, sir, we tried but we could not have time.
Q. Did you not testify before in the criminal case against Eduardo Aboroa with reference to what took place there on that night?
A. Yes, sir.
Q. In what direction did that person on the fence have his face when you saw him?
A. He was facing the camarin.
Q. You were not able to see his face were you?
A. I saw him.
Q. Did you see his face?
A. I saw it.
Q. Did he see you?
A. I cannot tell that.
Q. Could you tell if he had looked at you?
A. Yes, sir.
Q. Did he have anything in his hands?
A. I did not see.
Q. Did you see any fire around there?
A. I did not.

Q. You did not see any spark or smoke or anything.
77 A. I only saw the man.
Q. Did you see two Filipinos passing by the street about that time?
A. No, sir.

Redirect examination by Mr. LAWRENCE:

Q. Are you also called Tiana?
A. No, sir.
Q. But have you some other name they call you by?
A. No, sir.
Q. What Chinaman do they call Tiana?
A. Chan Tino (?).
Q. Who is the chinaman they call Tua?
A. Can Toco.
Q. Did you tell Chin Quangco about seeing Eduardo on the fence?
A. Yes, sir.
Q. Was he in charge of the store at that time?
A. Yes, sir, he was the man in charge.
Q. When did you tell him?
A. I told him since the fire began.

Recross-examination by Mr. KITCHENS:

Q. Was Chim Quangco with you there?
A. Yes, sir.
Q. You told him before the crowd arrived, then, did you not?
A. As soon as I saw it, I supposed that Eduardo had set fire to the house and I so told Chim Quangco.
Q. What was Chim Quangco doing in the house at that time?
Q. What was Chin Quangco doing in the house at that time?
A. He was calling for his servant, when I entered.

Witness excused.

78 FELIZ VALENTON, a witness being called on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. LAWRENCE:

Q. What is your name.
A. Feliz Valenton.
Q. How old are you?
A. Thirty-one years old.
Q. Wh-re do you live?
A. San Fernando, Union.
Q. What was your occupation in March, 1903?
A. I was cooking for Eduardo.
Q. Do you remember the night about March that year, the night when Tana's camarin burned?
A. Yes, sir.
Q. What time did you go to bed that night?
A. Past ten o'clock.
Q. Before you went to bed that night, what did you do?
A. We carried boxes and bundles.
Q. Where did you carry them from and where to?
A. We carried them to the cart.
Q. Where did you take them from?

A. From his store.
Q. Who.
A. Eduardo and myself?
Q. Anybody else help you?
A. No, sir.
Q. What things did you put in that cart?
A. Boxes and bundles.
Q. Where was the cart standing?
A. Inside of his yard.
79 Q. The next morning was the cart still there?
A. Yes, sir.
Q. Were the bundles and boxes there still.
A. Yes, sir.
Q. How long did they stay there in that cart?
A. I do not remember how many hours.
Q. How did they finally leave—were the boxes or bundles taken out of the cart, or was the cart taken away.

Mr. KITCHENS: The defendant objects to the question as being repetition and as incompetent, immaterial and irrelevant.
Mr. LAWRENCE: I have a slow witness, your Honor, and with the most intelligent witness it is not easy, sometimes, to get answers.
The COURT: You may go on and we will see if t-is is not material, then it will do no harm.
Exception.

A. Those bundles and boxes were taken from the cart.
Q. Where were they taken to?
A. They put them back into the store.
Q. What time of night was it when you and Eduardo loaded that cart?
A. It was past ten o'clock.
Q. Are you sure that it was the same night the camarin burned?
A. Yes, sir.

Cross-examination by Mr. KITCHENS:

Q. You are from Zambales, are you not?
A. No, sir.
Q. Ilocos?
A. Yes, sir.
Q. How came you to leave Eduardo?
80 A. I left him because I got sick.

Witness excused.

The Chinaman, Chan Toco, being sick and unable to come to the Court room, at the request of counsel for the plaintiffs, the counsel for the defendant agreeing thereto, the Court adjourned to the house of said sick Chinaman, and therein took his testimony, which is as follows:

CHAN TOCO, a witness called on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. LAWRENCE:

Q. What is your name?
A. Chan Toco.
Q. How old are you?
A. Thirty-seven years of age.
Q. Wh-re do you live?
A. San Fernando, Union.
Q. What is your business?
A. I am a baker.
Q. Who did you work for in March, 1903?
A. I was working for Tana.
Q. Did you sleep in Tana's camarin on the night said camarin was burned?
A. Yes, sir.
Q. Were you with Quieteo that night?
A. Yes, sir.
Q. Did you wake up in the night?
A. I was awakened up because of the barkings of the dogs around the house.
Q. What did you do?
A. I went out to the camarin with Quieteo to see if there were any thieves, because we had some tobacco wrapped outside of the camarin, and we were afraid some people desired to
81 steal it.
Q. How far did you go.
A. About six or seven brazas away.
Q. Did you go out to the street?
A. Yes, sir, I went out with Quieteo.
Q. Did you see anybody when you went out to the street?
A. Yes, sir.
Q. Whom did you see?
A. As we went out of the gate of the fence, we saw a man on the top of the fence and walked toward him, when my companion called "Eduardo," and the man did not answer but jumped down the fence and walked toward the southern direction.
Q. Did you recognize the man by his features?
A. Yes, sir, because he is my countryman.
Q. Who was it.
A. The Chinaman Aboroa.
Q. On what part of the fence did you see him on?
A. I saw him on the top of the fence.
Q. Near the front of the camarin or near the back where you saw him?
A. Close to the northeast corner of the camarin.
Q. After Eduardo went away, what did you and Quieteo do?
A. We went back to the camarin.
Q. Did you go to bed again?

A. Yes, sir, we lit a cigarette first and were about to go to bed when we heard the crying of the women from the camarin.
Q. Did you go to where the women were?
A. Yes, sir.
Q. What did you see?
A. Fire.
Q. On what part of the room did you see the fire?
82 A. On the ceiling of the room.
Q. About what time of the night was this?
A. About one o'clock at night.

Cross-examination by Mr. KITCHENS:

Q. When Eduardo jumped off the fence down into the street, as you say, did you see him any more that night?
A. No, sir.
Q. Did he jump out on the street on which you were or out on the other street?
A. On the main street.
Q. That was not on the same street on which you were?
A. No, sir.
Q. You say that you saw his features—what do you mean by that?
A. The way how he walked.
Q. Then you identified him by the way he walked?
A. Yes, sir, because I have known him since his childhood.
Q. When that man jumped off the fence, was the camarin on fire?
A. I did not see any.
Q. Did you see any fire?
A. I did not see any fire.
Q. Didn't you see a speck of fire anywhere?
A. I did not.
Q. Did you see any smoke?
A. I did not. I did not see anything at all except that I saw he put his hand into the hol*d* which is in the edge of the northeast corner of the camarin.
Q. You saw the man put his hand into the hole?
A. I meant to say there is a hole there—there was, so that a man could put his hand through there.
Q. What was that man doing on the top of the fence when
83 you saw him?
A. I first saw him on the fence but I do not know what he was doing?
Q. Did he see you?
A. Yes, sir, he saw us.
Q. Did he turn his face around toward you?
A. Yes, sir.
Q. About how near to that man did you get?
A. About two or three brazas away.
Q. You say that you were awakened by the barking of the dogs?
A. I do not know.
Q. Did you not follow the man; trace him up?
A. No, sir.

Q. As he went toward the south you did not f-llow him up, you just turned around and went back and smoked a cigarette?
A. Yes, sir.
Q. You say you were an employee of Tana at that time?
A. Yes, sir. We had a partnership to purchase tobacco at that time.
Q. Where was the tobacco store of Tana?
A. Behind the camarin of Tana.
Q. Who was the first person, if any, that you told about having seen that person on the fence?
A. This Chinaman, Chim Guangco.
Q. Did you tell it to anybody else?
A. No, sir.
Q. Why?
A. Because at that time Tana was in Manila.
Q. Did you not testify in the criminal case against Eduardo Aboroa where he was charged with the crime of arson?
A. Yes, sir.
84 Q. Did you not state in your testimony when you were asked who was the first person you told about seeing Eduardo on the fence that night, that you testified that it was the Chinaman Tana?
A. No, sir, I said Guano, which is the short name of Chan Guangco.
Q. Did you see the fire immediately after it began burning?
A. Immediately after I heard the cry of the women I went in and I saw then the fire on the ceiling of the house, there was a big spot.
Q. How large was that big spot?
A. Over two varas wide on the ceiling of the roof. The ceiling of the roof is composed of light materials and the roof is galvanized iron.
Q. How large was that fire?
A. Something over a vara in diameter.
Q. Explain what you meant by two varas?
A. The first fire was on the ceiling, just right above the walls, and the roof was also set on fire.

Witness excused.
Plaintiffs rest.
Court adjourned.

March 11, 1905, Morning Session.

LEON PONSE, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. KITCHENS:

Q. What is your name?
A. Leon Ponse.
Q. Where do you live?
A. San Fernando, Union.
Q. What is your occupation?

A. I am a Municipal Policeman.

85 Q. How long have you been a policeman for the town of San Fernando?

A. Three years.

Q. I will ask you if you were a policeman during all the month of March, 1903?

A. Yes, sir.

Q. Are you acquainted with the plaintiff, Tana, in this case?

A. Yes, sir.

Q. Are you acquainted with the defendant Eduardo Aboroa?

A. Yes, s-r.

Q. I will ask you if you remember the night when the camarin of Tana burned to the ground?

A. Yes, sir.

Q. Where were you on that night?

A. I was in the presidencia on the same street when the fire started.

Q. How came you to know when the fire started?

A. Through the light of the fire; I had just come to the presidencia that night, because I had been out on duty around the streets of the town and upon arriving there, a few moments afterwards the policeman on guard called my attention to the light and sent me down to see what it was.

Q. What was that light that you saw?

A. Upon arrival there at the place where I saw a light, I found that the camarin was burning; the fire was coming from the inside of the camarin.

Q. What do you mean by saying that it was coming from the inside of the camarin?

A. Because upon arrival there, I found that the door of the camarin was closed and we knocked on the door and called the man or person inside to open the door; because from the outside we could see the light inside, and as nobody came to respond—there

86 was a railing on the north part of the building—and we looked through it, but we could not see anything; but just about that iron railing there was another bamboo railing, and we looked through it and we then saw the light inside of the building.

Q. From the fire and its direction, could you tell where it had originated?

A. Yes, sir.

Q. From where did it originate?

A. From down on the floor which is right the place where the women were lying down. Because we looked from above and saw the fire on the floor.

Q. Is the presidencia on the same street on which this storehouse is located?

A. Yes, sir.

Q. The light which you saw was coming out from the top of the house or from the side?

A. From the side of the building.

Q. Did any person go with you to the fire?

A. Yes, sir, one policeman.

Q. When you arrived upon the scene of the fire, was there any other person present there?
A. We did not see anybody upon arriving there.

Cross-examination by Mr. LAWRENCE:

Q. By which door did they let you into the building?
A. We were not able to get in because they did not open the door.
Q. Did you not go into the building at all?
A. No, sir.
Q. Through which door did you try to get in?
A. The door which leads to the main street.
Q. Does that door open on the street in front of the building?
87 A. It was not open, but that was the door we tried to get in.
Q. That door is on calle Principal?
A. Yes, sir.
Q. Was the window where you looked in, on calle Principal?
A. Yes, sir.
Q. Did that window open up into the store where the goods were kept.
A. No, sir.
Q. What room did it open into?
A. When we looked through we saw by the light of the fire on the floor the women and the fire—the women we did not see but heard them. It seemed like they were trying to get out.
Q. Did you see the women?
A. We did not see them, but we heard their voices.
Q. Now, when you looked into that window, was the fire to the right or to the left, or overhead?
A. It was right in front of us.
Q. How long did you stand there in the window?
A. For about a minute.
Q. Was not the fire too hot for you to stand at that window?
A. No, sir, because at that time we went to the house in order to make assistance to try to put the fire out, but nobody opened the door.
Q. Were you lying down when the policeman on watch told you about the fire?
A. No, sir, I was not; I had just come into the quarters.
Q. Where was that man when he told you about the fire?
A. He was in the door of the presidencia.
Q. Could you see the fire from the door of the presidencia?
A. Yes, sir, because it was light enough.
88 Q. What could you see, the blaze?
A. Yes, sir.
Q. Wh-re is the presidencia?
A. On the main street west from the presidencia.
Q. On the same street that the camarin that burned?
A. Yes, sir.
Q. And on the same side of the street, is it not?
A. Yes, sir.
Q. Then standin- in the door of that building you could see the blaze of the fire, is that right?

A. If a man should be standing right in the door of the presidencia, he could not see the fire, but if he should stand on the other side of the street in front of the presidencia, he could see very well the blaze.

Q. When you got down to the building, the fire was on the inside, was it?

A. Yes, sir.

Witness excused.

MANUEL DOLORES, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. KITCHENS:

Q. What is your name?
A. Manuel Dolores.
Q. Age.
A. Twenty-five years of age.
Q. What is your occupation?
A. Laborer.
Q. Where is your residence?
A. San Fernando, Union Province.
Q. Were you a resident of San Fernando, March, 1903?
89 A. Yes, sir.
Q. What was your business at that time?
A. Policeman of the municipality.
Q. Do you remember the night on which was burned the store house of Tana, the plaintiff in this case?
A. Yes, sir.
Q. Where were you?
A. I was in front of the presidencia.
Q. What were you doing there?
A. I had been out on duty and I just went back with my companion.
Q. Do you know whose warehouse that was?
A. Yes, sir.
Q. Did you go to the scene of the fire?
A. Yes, sir.
Q. How came you to go?
A. Because after we got into the presidencia the policeman on guard standing outside of the door, called our attention to the fact that he saw a light which he thought came from a fire.
Q. You went to the scene of the fire did you?
A. Yes, sir.
Q. What did you do there?
A. Upon arriving there we knocked at the door calling the people inside of the building to open the door for us.
Q. Could you see the fire from where you were standing?
A. Yes, sir.
Q. From the fire and its direction, could you tell where it originated?
A. Yes sir.

Q. From where did it originate?
A. The fire was in the room on the north part of the building and in my opinion originated from the west and comes out
90 to the east.
Q. In what place do you mean?
A. Inside of the room.
Q. From above, side, or *g*rom where?
A. From the lower part of the building.
Q. Have you any interest in this case?
A. No, sir.
Q. State whether or not you saw the wall which was situated north of this store house?
A. What do you mean?
A. Did you see the fence near the building?
A. Yes, sir.
Q. What kind of a fence was it?
A. Caña buja.
Q. How high was that fence?
A. About two brazas.
Q. Can you state how far that fence was from the camarin?
A. About one braza.

Cross-examination by Mr. LAWRENCE:

Q. Were you ever inside that fence—between the fence and the building?
A. I have never been there, but I have seen it from the outside?
Q. Is it from what you noticed that night that you say the fence was a braza from the building?
A. No, sir, I had noticed that days before.
Q. Have you ever noticed the fence since the fire?
A. No, sir. Because it was also burned up; I saw it before it was burned.
Q. Where were you when you first saw the fire?
91 A. I was in front of the presidencia.
Q. Could you see from there the light of the fire or what part of the building was burning?
A. When we arrived there we saw that the room on the north of the building was on fire.
Q. How could you see that fire?
A. Because there was an iron railing and it was close by a window inside of the room and just right above that was another railing, and we looked through it and saw the fire.
Q. How large was the fire when you first looked and saw it?
A. It had a diameter of about ten feet then.
Q. What was it that was burning, the floor itself or what the furniture?
A. I could think that the matter was there out of the beds, which were on the floor, and that was on fire.
Q. The beds were burning, were they?
A. In my judgment, because that was burning at that time, because I think that the floor had not been burned at that time. Nothing except the matting that they used as beds.

Q. Was there anybody in the room?

A. I did not see anybody, because the first thing we saw was the fire, but we heard voices.

Q. Did you notice whether there was a lamp in the room?

A. I did not see any except the fire.

Q. Where did that fire first break through—the walls or the building?

A. It came out through the same railing of the building through which we looked into the room.

Witness excused.

92 EDUARDO ABOROA, the defendant, called as a witness in his own behalf, being first duly sworn, testifies as follows:

Direct examination by Mr. KITCHENS:

Q. Are you the defendant in this case?

A. Yes, sir. I am forty years of age, resident of San Fernando, Union.

Q. Do you remember where you were on the night of the first of March, 1903?

A. I was inside of my house.

Q. Do you remember if that was the night on which the camarin of Tana was burned?

A. Yes, sir.

Q. Do you know anything about the burning of that building or how it came to be burned?

A. I know nothing about it.

Q. State whether or not on the night of the burning of that camarin, you went down to the camarin and stood upon a fence near by?

A. No, sir, I was asleep in my house after I smoked opium.

Q. Did you hear the testimony of Quieteo?

A. Yes, sir.

Q. Is it true or false his testimony with reference to having seen you on top of a fence near that camarin on or about one o'clock on that night?

A. That statement, sir, is false, because I never came out of the house after I had supper that night, because I smoked opium and then I went to bed about ten o'clock that night.

Q. You heard the testimony of Pedro Baldez and Sinforoso Tadipa did you not.

A. Yes, sir.

93 Q. State whether or not it is true or false their declarations to the effect that they met you on the street on or about 2 o'clock that night?

A. Their statement is not true, and I have to say that they swore falsely, because I did not go out of my house during that night.

Q. Did you hear the testimony of Feliz Valeton?

A. Yes, sir.

Q. Is it true or false that on the night of the fire about ten o'clock you filled a cart with bundles and grips?

A. It is not true his statement, because that night I was in my house and he was not in my service; during that month he left my service and my house and sailed on a proa to the province of Zambales and Pangasinan. He had been away for about eight months; I think that he left there about April or June, some two years ago.

,Cross-examination by Mr. LAWRENCE:

Q. You went to bed about ten o'clock that night?
A. Yes, sir.
Q. Did you go out of your house again that night?
A. No, sir.
Q. Didn't you wake up during the night?
A. After I fell asleep, I did not wake up again?
Q. When did you first know that Tana's camarin had been burned?
A. My clerk woke me up stating that there was somebody crying in the street saying that there was a fire.
Q. Did you go out and see where the fire was?
A. Yes, sir. I saw the fire and when I found that it had a big blaze, I went back to my store to pack the goods that I had.
94 Q. Then you did go out of your house that night?
A. I went out when the building was burning.
Q. You said that Feliz Valeton left your service in April or June, you did not state what you—what year was that?
A. In 1902, the year before the fire.

Witness excused.

VALERIANO HIDALGO, a witness called on behalf of the defendant, being first duly sworn, testifies as follows:

Direct examination by Mr. KITCHENS:

Q. What is your name.
A. Valeriano Hidalgo. I am 24 years of age, and Chief Clerk of the Coast District Inspector's office.
Q. Do you keep a record in your office of the boats that arrive and depart, as well as the sailors who work on said boats?
A. Yes, sir.
Q. Do you know what the occupation of Feliz Valeton was in February and March, of 1903?
A. He was a member of the crew of the proa called San Pedro.
Q. Will you please state to me when, if at all, the proa San Pedro left San Fernando, February, 1903?
A. (Witness testifies from book.) The proa San Pedro sailed to San Isidro, from San Fernando on the 21st day of February, 1903, and the same vessel returned to this port on the 7th day of March, 1903, and on that trip Feliz Valeton was one of the crew of the said vessel.
Q. Have you the number of the cedula of said Valeton?
A. Yes, sir, No. 542,668—the date is not given.

Cross-examination by Mr. LAWRENCE:

Q. How long have you been in said Inspector's office?
A. Almost four years.
95 Q. Do you know Feliz Valeton personally?
A. No, sir.
Q. Did you make the entries in the book from which you have been testifying?
A. I did not make the entries myself personally, because I have an assistant clerk whose duty it is to make these statements, but as Chief Clerk, I have knowledge of all the entries kept in the office.
Q. Do you know anything about the sailing of the proa San Pedro at that time, except from the entries on the book?
A. No, sir.
Q. Do you know who the crew of the San Pedro were except by your book?
A. I only know from the record.
Q. Where do you get the names of the crew, from the master of the vessel?
A. Yes, sir.
Q. Then you make those entries of the crew from the list of names that the master gives you?
A. Yes, sir, under the list submitted by the master of the——
Q. Who is the owner of the proa San Pedro, as appears from the record which you have in your hand?
A. Bonifacio Pragides.

Witness excused.

CALIXTO PIMENTEL, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. KITCHENS:

Q. What is your name?
A. Calixto Pimental.
Q. Where do you live?
A. San Fernando, Union.
96 Q. What is your age?
A. 27 years old, and I am a driver by trade.
Q. Where were you during the month of March, 1903?
A. I was in San Fernando, Union.
Q. What was your business during that month?
A. I was a driver.
Q. Do you remember the night on which the camarin of Tana was burned?
A. Yes, sir.
Q. Where were you?
A. I was with Sinforoso Tadipa, in a north direction from Bauang.
Q. From what town were you coming?
A. We loaded coffee from the town of Naguilian.
Q. When did you go to Naguilian to get that coffee?

A. About noon of one day, but when we returned to San Fernando, we found that the store of Tana was burned up.

Q. How many days were you gone on that trip?

A. We left about the middle of the day and we arrived back to San Fernando on the last night, or sunrise on the next morning.

Q. Was the camarin of Tana burned when you left here?

A. It was not burned when we started from here.

Q. Was any person with you when you started?

A. Sinforoso Tadipa, was my companion.

Q. What was he doing?

A. He went with me to load coffee.

Q. How many carts did you have?

A. Two carts.

Q. Did Sinforoso have a cart of his own?

A. Yes, sir.

97 Q. What time did you leave Naguilian?

A. I should say a little before seven o'clock at night. Because when we reached Naguilian it was yet early, but when we left we heard the church strike seven o'clock.

Q. Did you get the coffee?

A. Yes, sir.

Q. What did you wo with it?

A. We brought it to San Fernando and we arrived here in the morning.

Q. What did you do with the coffee when you arrived?

A. We delivered the coffee to the companions of Tana who left it in store just right behind the building which was burned up; that is their storage place.

Q. From whom was Sinforoso hauling?

A. For the Chinamen.

Cross-examination by Mr. LAWRENCE:

Q. Did anybody else go with you besides Sinforoso?

A. No, sir.

Q. When did you make your next trip after that to Naguilian?

A. We never went since.

Q. How long before that had you made a trip to Naguilian?

A. That was the first and last trip we made when I went with Sinforoso.

Q. How long after that did you go to Naguilian with anybody?

A. A long time after that. The next time since the trip I made to Naguilian when I brought coffee, was last month when I took some goods there for the constabulary.

Q. That is the first time you have been in Naguilian since the time of the fire?

98 A. I have been there many times but I cannot tell exactly when.

Q. After that trip with Sinforoso, when did you next go to Naguilian.

A. A long time after that. I went by myself to Naguilian and

brought there some goods for the constabulary. Sinforoso did not go with me at that time.

Q. When was the last time you went to Naguilian before the trip with Sinforoso?

A. I never went with Sinforoso before that.

Q. Have you made many trips to Naguilian as driver?

A. Yes, sir, those trips I took goods for the Constabulary.

Q. Can you give me the date of any other trip except that with Sinforoso?

A. I do not remember the dates or days.

Q. Then of all the trips you have made to Naguilian, the only one you can remember the date of, is the one when you went there with Sinforoso, is that right?

A. I do not know the date, but I am positively sure when I made a trip with Sinforoso and that I returned with him and upon our arrival that Tana's place was burned.

Q. Can you give me the name of anybody who went with you on any other trip.

A. Yes, sir. My brother went with me some times.

Q. Did you ever work with Sinforoso anywhere else?

A. No, sir.

Q. Did you know Sinforoso before that trip you made to Naguilian?

A. Yes, sir, because we are neighbors; he lives near my house.

Q. Do you know Pedro Baldez?

A. Yes, sir, I know him well, he lives in the same community.

Witness excused.

99 EMETERIO RIVERA, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. KITCHENS:

Q. What is your name?

A. Emeterio Rivera.

Q. Age?

A. Forty years of age.

Q. Where do you live?

A. San Fernando, Union.

Q. What is your occupation?

A. Laborer.

Q. How long have you been a resident of San Fernando?

A. Since I was born.

Q. Do you remember the time when the store house of Tana was burned in March, 1903?

A. Yes, sir.

Q. Do you remember where you were on the morning after the camarin or storehouse was burned?

A. Yes, sir.

Q. Where were you?

A. I was in the market.

Q. Were you at any time near the place where the camarin or storehouse was burned?

A. Yes, sir, because I was called by a policeman standing there at that time on guard.

Q. Do you know Calixto Pimentel?

A. Yes, sir.

Q. Do you know Sinforoso Tadipa?

A. Yes, sir.

Q. Did you see them on the morning after the camarin of Tana was burned?

100 A. I saw them unloading sacks containing coffee.

Q. Where?

A. In the street that leads to the market, passing by north of the camarin which was burned.

Q. What was Sinforoso Tadipa doing there?

A. He was helping Calixto Pimentel unloading sacks of coffee, and taking them over into the deposito.

Q. About what time was that?

A. The sun was yet early in the morning sky.

Q. Did you see any other person present there?

A. Yes, sir, I saw some persons trying to put out the fire which was still burning—the posts of the camarin.

Cross-examination by Mr. LAWRENCE:

Q. Who were those persons trying to put out the fire?

A. I do not know who they were; there were many persons there.

Q. Was there anybody there except Sinforoso and Calixto that you knew?

A. I knew the policemen there and also some other persons who had been called there by the policeman, because the policemen were there on guard and they called the men to come and put the fire out.

Witness excused.

FERDINANDO SUERRERO, a witness called on behalf of the defendant, being first duly sworn, testifies as follows:

Direct examination by Mr. KITCHENS:

Q. What is your name?

A. Fernando Suerrero.

Q. What is your age?

A. 27 years.

Q. Where do you live?

101 A. San Fernando, Union.

Q. What is your occupation?

A. Municipal policeman.

Q. How long have you been a municipal policeman of this town?

A. Since February, 1902. (Or January.)

Q. Do you remember the night on which the camarin was burned in this town in 1903?

A. Yes, sir.

Q. Were you on the scene of the fire on the night on which it was burned?

A. I was sent there with my companions.

Q. While you were there, did you learn how the store came to be burned?

A. Upon arriving there, I asked my companions who were with me, where the fire commenced, and my companions told me some of the flames came out of the room and I was looking through the railing and saw the firing inside of the room and the fire was on the floor.

Q. Did you have a conversation with a man by the name of Guano.

A. While I was standing there, because my companions and other parties left me, and when the roof of the camarin had burned down, then came out the chinaman by the name of Guano and I asked him what was the cause of the fire and he told me that the fire originated from the lamp in the room where the ladies were sleeping.

Mr. LAWRENCE: I move that the last part of the answer of the witness be stricken as hearsay.

The Court grants the motion of the counsel for the plaintiffs, and the same is stricken.

Q. Did you personally, while near that camarin that night, see a fence near the camarin?

102 A. Yes, sir. There was one tall fence between the main street and the building that is on the east side from the building?

Q. Was there a fence on the north side of the building?

A. Yes, sir.

Q. Do you know how far that fence was from the building?

A. I could not say exactly.

Q. More or less?

A. About six feet.

Q. Do you know what kind of roofing that building had on?

A. It was galvanized iron.

Q. Do you know what the walls of that camarin were made of?

A. Also galvanized iron.

Cross-examination by Mr. LAWRENCE:

Q. How far was the fence on the east of the building from the building?

A. The fence I mention was at the northeast corner of the camarin; that is the fence standing there by the camarin; there were two doors; right in front of the camarin into the street, and on the north side of that camarin there was a fence at a distance of one braza as I have indicated.

Q. Was there any fence on the east side of the building?

A. Yes, sir. It was just fronting to the room where the women were.

Q. About how far is that fence from the building?

A. About the same distance as I have indicated before.

Q. Did either of the fences run up against the building, or continue *thoug-*, could you walk through between the fence and the building.

A. You could not walk through, because of the corner of that fence is closed; and in order to get into the fence between the fence and the camarin it is necessary to pass the front of the door of the camarin and go a little right through between the
103 camarin and the fence.

Q. Then the front of the camarin on calle Principal is back a braza from the street?

A. I can not tell; there is a little balcony right on the line with the street and it was a little distance between that place and the door which I could not tell precisely.

Q. Did this platform extend the whole front of the camarin?

A. Yes, sir.

Q. Was the fence along the front edge of that platform?

A. Yes, sir, on both ends of the platform there was a fence.

Counsel for plaintiffs ask the witness to make a rough sketch of the premises as they were on the night. Witness makes a paper, and on the plan so made, the witness states that A. B. C, represent the fence. The other points are marked on the plan.

Mr. LAWRENCE: I ask that the plan be admitted into the record.

Mr. KITCHENS: I have no objection but I want to ask him a few more questions.

By Mr. KITCHENS:

Q. What kind of fence is that?

A. Caña buja.

Q. Was the fence joined at the northeast corner of the camarin?

A. Yes, sir.

Q. With what?

A. The bamboo fence itself was built right close *fo* the end of the wall.

Witness excused.

Case closed.

I hereby certify that the above and foregoing is a true and correct transcript of all the oral evidence given at the trial of said case.

Lingayen, P. I. May 13, 1905.

(Signed) CHARLES HAFFKE,
Stenographer, Third Judicial District.

104 R. G. No. 2993.

UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

LUCINO ALMEIDA CHANTANCO ET AL., Plaintiffs and Appellants,
vs.
EDUARDO ABAROA, Defendant and Appellee.

Mr. J. E. Blanco, Clerk of the Supreme Court of the Philippine Islands.

SIR: Please enter my appearance in these records as attorney for the appellants in place of Messrs. Pillsbury and Sutro who have retired from the same.

I am sending a copy of the present to Messrs. Kitchens and Moran, counsel for the opposing party.

Manila, December 7, 1907.

W. A. KINCAID,
Attorney for Appellants.

Filed in the Clerk's office of the Supreme Court of the Philippine Islands this 7th day of Dec., 1905. 4:10 P. M.

J. E. BLANCO, *Clerk.*

105 THE UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

LUCINO ALMEIDA TAN CHANCO, Plaintiff and Appellant,
vs.
EDUARDO ABAROA, Defendant and Appellee.

Appearance.

The Clerk will please enter our appearance in representation of the defendant and appellee.

(Signed) KITCHEN & MORAN.

Lingayen, I. F.

106 UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

LUCINO ALMEIDA CHANTANGCO ET AL., Plaintiffs and Appellants,
vs.
EDUARDO ABAROA, Defendant and Appellee.

For Indemnity for Damages.

March 11, 1907.
General Register No. 2993.
Book of Decisions, 11, F. —.
Hearing: July 18, 1906.
Present: The Hon. President, and Justices Torres, Mapa, Carson, Williard and Tracey.

Decision.

Without prejudice to amplifying the grounds of the sentence appealed from, and considering it to be in accordance with law and the merits of record, it is confirmed with the costs in this instance to the appellants. Twenty days after the notification of this decision, let judgment be entered in compliance herewith, and 10 days later let the records be returned to the Court below for the proper effects.

It is so ordered.

(Sgd.) C. S. ARROLLANO.
FLORENTINO TORRES.
VICTORINO MAPA.
A. C. CARSON.
CHARLES A. WILLIARD.
JAMES F. TRACEY.

107 R. G. No. 2993.

UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

LUCINO ALMEIDA CHANTANGCO ET AL., Plaintiffs and Appellants,
vs.
EDUARDO ABAROA, Defendant and Appellee.

Come now the plaintiffs and appellants and except to the decision of the Court confirming the judgment of the Court of First Instance of La Union, and pray the Court to admit this exception as presented in due time and form.

Moreover, it is my intention to carry this cause to the Supreme Court of the United States, for which reason it interests me greatly

to have the grounds of the decision in order to present the motion for new trial before the period for filing it expires.

Manila, March 13, 1907.

(Sgd.) W. A. KINCAID,
Attorney for the Plaintiffs and Appellants.

108 UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

MANILA, *March* 15, 1907.

Mr. W. A. Kincaid.

SIR: This Supreme Court in session the 14th inst., adopted the following resolutions:

"The petition presented by counsel Kincaid having been heard, asking to know the grounds for the decision rendered in cause No. 2993, Almeida Chantangco *et al. vs.* Abaroa, in order to be able to file a motion for new trial before the expiration of the time fixed by the rules, the Court ordered that said petition be united with the records for record and its other effects."

Copy furnished you for your information.

(Sgd.) J. E. BLANCO,
Clerk, Supreme Court, P. I.

109 R. G. No. 2993.

UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

LUCINO ALMEIDA CHANTANGCO ET AL., Plaintiffs and Appellants,
vs.
EDUARDO ABAROA, Defendant and Appellee.

Come now the plaintiffs and appellants and pray the Court to order that the period for presenting the motion for new trial shall not begin to run until the principal decision shall have been written.

Manila, March 20, 1907.

(Signed) W. A. KINCAID,
Attorney for the Plaintiffs and Appellants.

110 UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

MANILA, *March* 22, 1907.

Mr. W. A. Kincaid.

SIR: This Supreme Court in session of the 21st instant, adopted the following resolution:

"The petition presented by counsel Kincaid praying that the time prescribed by the rules for moving for a rehearing in cause No.

2993 of Almeida *vs.* Abaroa, in which decision was rendered March 11, 1907, be extended, having been heard by the Court, it resolved that the same be denied."

Copy furnished for your information.

(Sgd.) J. E. BLANCO,
Clerk, Supreme Court.

Copy for Mr. Kitchens.

111 R. G. No. 2993.

UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

LUCINO ALMEIDA CHANTANGCO ET AL., Plaintiffs-Appellants,
vs.
EDUARDO ABAROA, Defendant, Appellee.

Come now the Plaintiffs and appellants and, 1st, except to the decision of this Court denying the petition of the 20th instant praying that the time for filing the motion for new trial in this cause do not begin to run until the principal decision shall have been rendered; 2nd, present within the time their motion for a new trial and prays the Court to annul its decision and to grant a rehearing of the cause, on its merits, for the following reasons:

I.

The Court erred in ruling that the sentence acquitting the accused in a criminal cause, previously rendered, was decisive of the civil action exercised in the complaint in this cause.

II.

The Court erred in ruling that a sentence convicting the defendant for the crime of arson was a prerequisite indispensable
112 to rendering judgment in favor of the plaintiffs for the prejudice and damages caused by the burning of the camarin, store and goods.

III.

By virtue of the proofs presented in the trial, the Court erred in not rendering judgment in favor of the plaintiffs.

Moreover; In case the Court denies this motion for a new trial, the plaintiffs pray that it render its findings of fact and law on which it bases its decision in order that the Bill of Exceptions may be prepared for the revision of the judgment of this Court by the Supreme Court of the United States, the amount of the controversy being more than sufficient to admit of the remedy of a writ of error.

Manila, March 22, 1907.

(Sgd.) W. A. KINCAID,
Attorney for the Plaintiffs and Appellants.

113 UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

MANILA, *March* 25, 1907.

Mr. W. A. Kincaid & Mr. Kitchens.

SIR: This Supreme Court in session of the 23d instant, adopted the following resolution:

"The writing presented by counsel Kincaid, praying for the annulment of the decision rendered the 11th inst. in cause No. 2993, Severino Almeida Chan Tangco *et als. vs.* Eduardo Abaroa, having been heard, the Court denied the rehearing petitioned for."

Copy furnished for your information.

J. E. BLANCO,
Clerk, Supreme Court.

114 R. G. No. 2993.

UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

LUCINO ALMEIDA CHANTANGCO ET AL., Plaintiffs-Appellants,
vs.
EDUARDO ABAROA, Defendant-Appellee.

Come now the plaintiffs and appellants and except to the resolution denying the motion for a new trial petitioned for in the above entitled cause.

Therefore, they pray the Court to admit this exception as presented in due time and form.

Manila, March 27, 1907.

(Sgd.) W. A. KINCAID,
Attorney for the Plaintiffs and Appellants.

115 R. G. 2993.

UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

LUCINO ALMEIDA CHANTANGCO ET AL., Plaintiffs and Appellants,
vs.
EDUARDO ABAROA, Defendant and Appellee.

Come now the plaintiffs and appellants and except to the resolution of the Court refusing to state the findings of fact and law on which its decision in this cause is based.

Therefore, they pray the Court to admit this exception as presented in due time and manner.

Manila, March 27, 1907.

(Sgd.) W. A. KINCAID,
Attorney for the Plaintiffs and Appellants.

116 UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

MANILA, *April* 5, 1907.

Mr. W. A. Kincaid & Mr. Kitchens.

SIR: This Supreme Court in session of the 27th of March ultimo, adopted the following resolution:

"On reading the petition presented by Attorney Kincaid, excepting to the resolution denying the new trial solicited by him in name of the appellants in cause No. 2993 of Almeida *et al. vs.* Abarroa, the Court on hearing it resolved to admit said exception as filed in due time and form, and ordered that it be united with the records to form part of them for its proper effects."

Copy furnished for your information.

J. E. BLANCO,
Clerk, Supreme Court.

117 THE UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

No. 2993.

LUCINO ALMEIDA CHAN TANCO ET AL., Plaintiffs and Appellants,
vs.
EDUARDO ABAROA, Defendant and Appellee.

Per Curiam:

The following conclusions of this court are in enlargement and addition to those findings contained in the judgment appealed from, as indicated in the decision of this court rendered in civil cause No. 2993 between the parties herein:

The subject-matter and cause of the civil action instituted by the plaintiffs were the same as attributed by one of them to the defendant for having set fire to and burned the store and *camarin* (warehouse) with all the effects contained in the same, the property of the plaintiffs. This constituting the crime of arson, it was made the object of a criminal prosecution brought against said defendant Eduardo Abaroa Chan Em; the civil action was brought notwithstanding the accused was acquitted by the court below, which judgment was affirmed by this court by reason of lack of satisfactory proof showing the participation of the accused in the criminal act.

This acquittal, which should be understood as being full and complete, as prescribed in the last paragraph of rule 51 of the Provisional Law for the application of the present Penal Code
118 and in conformity with article 840 of the Revised Compilation and article 144 of the Law of Criminal Procedure of 1882, necessarily implies the innocence and freedom from respon-

sibility of the accused in that it has not been duly proved that he was the author of the fire.

It is not shown that there is any other ground upon which to base the action brought against the defendant for damages and indemnity for the same, and praying for final judgment against said defendant, than the actual act of arson, which act, if it were intentional, necessarily constitutes the offense of the same name, and could only be considered otherwise if it were caused accidentally.

Article 742 of the said Law of Criminal Procedure of 1882 referred to among others in rule 95 of the said Provisional Law, provides: "In said judgment there shall be decided all questions arising in the trial, and the accused shall be condemned or acquitted not only of the principal offense and offenses connected therewith but also of any incidental misdemeanors which may have been proven in the case; and the tribunal, at this stage of the proceedings, can not dismiss the case in respect to the accused persons who ought not to be condemned.

"All questions referring to civil liability and responsibility which arise in the trial shall also be decided in the said judgment."

The defendant, Abaroa having been acquitted of the charge against him as the supposed author of the crime of arson, can not be made a defendant, nor can judgment be rendered against him, by reason of a civil action, for the payment of the amount of the loss and damages caused to the plaintiffs by said fire.

The supreme Court of Spain applying the legislation still observed in this country, (section 1 of General Orders, No. 58) in its decision of April 28, 1884, established the doctrine: "That
119 the decision acquitting in full the accused persons settles in an explicit or tacit manner all the points in question, not only in the accusation but those of the defense, all of which is the established jurisprudence of the supreme tribunal." In conformity with this doctrine, and in accordance with law, he, who was then the accused and now the defendant, has also been acquitted from civil liability and responsibility as well as from criminal responsibility.

It is a logical sequence of the rule established in article 17 of the Penal Code, that "all persons criminally responsible for a crime or misdemeanor are civilly responsible as well," and the exemption from criminal liability carries with it exemption from civil responsibility as well.

The aforesaid supreme court, in its decision of January 3, 1877, holds the same doctrine: "In order to decree or find as to the civil liability or responsibility in a case, it is necessary that the same came from—that is to say, was a consequence of—the criminal liability; and therefore, if the accused has been acquitted of the crime, the court that orders him, by reason of the same, to pay a determined or fixed indemnity, violates this article." (Art. 17 of the Penal Code.)

The same high court, in another decision of December 20, 1882, established the following: "That those who are not criminally responsible for a crime or misdemeanor can not be made civilly respon-

sible, in accordance with the provisions of article 18 of the Penal Code (art. 17 of the Philippine Penal Code), and the court, not having taken this into consideration in its judgment, infringed said articles 18 and 21, and incurs an error of law, as is shown in section 4 of article 849 of the Revised Compilation." It is not possible to conceive, if it is not permitted to find against an accused acquitted of civil responsibility in a criminal case, how he can be held
120 responsible for the same in a civil case in the absence of any law authorizing the same, and this is an explicable counter-course.

It can not be conceived l[illegible]lly that an act of setting fire executed intentionally is not constitu[illegible] of the crime of arson, and that its author, without being found personally responsible according to the penal law, is to be only civilly responsible therefor.

The reparation for damage and the indemnity for losses suffered and claimed by the plaintiffs against the defendant are derived from the act itself in the supposition that the fire was caused intentionally, of which accusation the said defendant was acquitted in a criminal cause, and it follows that if the defendant was not the author of the crime, under no condition can he be held responsible and liable for the evil and loss occasioned by the criminal act.

Instituting a criminal action only, it will be understood, brings the civil action as well, unless the damaged or prejudiced person waives the same or expressly reserves the right to institute the civil action after the termination of the criminal case, if there be any reason therefor. (Art. 112 of the said Law of Criminal Procedure.)

The right to bring the civil action, as reserved by the person damaged or prejudiced, after the termination of the criminal case, is only permitted, *if there be any reason therefor,* and so says the law, in the event that the judgment rendered in the criminal cause is a finding of guilt against the accused; but if the accused be acquitted, then the complaint in the civil action must be based on some fact and or cause distinct and separate from the criminal act itself.

121 For this reason article 114 of the same Law of Procedure provides: "When a criminal proceeding is instituted for the judicial investigation of a crime or misdemeanor, no civil action arising from the same act can be prosecuted; but the same shall be suspended, if there be one, in whatever stage or state it may be found, until final sentence in the criminal proceeding is pronounced.

"To prosecute a penal action it shall not be necessary that a civil action arising from the same crime or misdemeanor be previously instituted."

It is to be remembered that the dismissal or dropping of a penal action, as we find it in article 116 of the same Law of Procedure, is not the same as the acquittal of the accused for any of the reasons and causes designated in rule 51 of the said Provisional Law; and for this reason the said article says that said dismissal does not carry with it the corresponding right to proceed against the person so obligated for the restitution, reparation, or payment of indemnity, which could not be verified against the accused acquitted of the offense out of which the civil action originated.

It has not been alleged or shown by the plaintiffs, as a cause of action instituted civilly against the defendant, that the aforesaid fire was caused through any fault or negligence on the part of the defendant, nor is there shown any motive or cause distinct from that act, the subject of the case already terminated, in accordance with the provisions of articles 1093, 1902 and 1903 of the Civil Code; yet they, the plaintiffs, seek to obtain and make effective such
122 liability by reason of the same offense and notwithstanding the acquittal of the defendant and the provisions of article 1092 of the same code, which provides that all civil obligations arising from crimes or misdemeanors shall be governed by the provisions of the Penal Code, all of which have already been mentioned.

The reservation set out in the judgment of the court below, and affirmed by a decision of this court, is taken to mean and refers only to other causes and reasons upon which to base a civil action arising from and in consequence of said fire, and under no condition can it be understood to mean the reservation of any civil action originating out of and from the same crime or offense and brought against the defendant, who has already been acquitted of the same under a final decision.

For these reasons, in addition to those set forth in the judgment appealed from the said judgment is affirmed.

Arellano, C. J., Torres, Mapa, Willard and Tracey, JJ., concur.

Judgment affirmed.

123 THE UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

LUCINO ALMEIDA CHAN TANCO ET AL., Plaintiffs and Appellants,
against
EDUARADO ABARROA, Defendant and Appellee.

Sentence.

April 2, 1907.
Judgment Book No. 4.
Register No. 2993.

This Court having regularly acquired jurisdiction for the trial of the above entitled cause, submitted by both parties for decision, after consideration thereof by the court upon the record, its decision and order for judgment having been filed on the eleventh of March, 1907.

By virtue thereof the judgment appealed from the Court of First Instance of Union dated the 24th of April, 1905, is hereby affirmed, with the costs of this instance against the appellants.

It is further ordered that the defendant recover from the plaintiffs the sum of P40.00, as costs.

(Signed) J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands.

124 R. G. No. 2993.

UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

LUCINO ALMEIDA CHANTANGCO ET AL., Plaintiffs-Appellants,
vs.
EDUARDO ABAROA, Defendant-Appellee.

Exception to the Definite Sentence.

Come now the plaintiffs and appellants and except to the final judgment rendered on this date in the above entitled cause.

Wherefore, they pray the Court to admit this exception as presented in due time and form.

Manila, April 2, 1907.

(Sgd.) W. A. KINCAID,
Attorney for the Plaintiffs and Appellants.

125 UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

LUCINO ALMEIDA CHANTANGCO and ENRIQUE LETE, Plaintiffs and Appellants,
vs.
EDUARDO ABAROA, Defendant and Appellee.

Come Lucino Almeida Chantangco and Enrique Lete in the above entitled cause and represent:

I.

That final judgment has been rendered in said cause by which the judgment of the Court of First Instance dismissing the complaint has been confirmed, in violation of the Philippine Bill as appears from the accompanying assignment of errors.

II.

The value of the controversy in said case is more than twenty-five thousand dollars.

III.

Wherefore petitioners pray that they be granted a writ of error from the Supreme Court of the United States to the Supreme Court of the Philippine Islands with a supersedeas judgment upon the execution and approval of a bond in such sum as may be deemed sufficient, conditioned as required by law, pending such writ of error, in order that the judgment may be revised by the Su-
126 preme Court of the United States upon the assignment of errors presented with this petition.

They also pray that the record of the cause be ordered translated from Spanish to English in conformity with the rule prescribed by the Supreme Court of the United States.

(Sgd.) W. A. KINCAID,
Attorney for Petitioners.

127 In the Supreme Court of the United States.

In the Matter of the Petition for a Writ of Error of LUCINO ALMEIDA CHANTANGCO and ENRIQUE LETE, Plaintiffs in Error,
versus
EDUARDO ABAROA, Defendant in Error.

Assignment of Errors.

Come Lucino Almeida Chantangco and Enrique Lete and say that in the record and proceedings in the above entitled cause there is manifest error in this, to-wit:

I.

The Court erred in holding that a former judgment of acquittal rendered in a criminal action was decisive of the civil action exercised in the present case.

II.

The Court erred in holding that a judgment of conviction for the offense of "incendio" was an indispensable prerequisite to the rendition of a judgment in favor of the plaintiffs for the damages caused by the burning of the "camarin," store and effects.

III.

In view of the evidence admitted at the trial the Court erred in not rendering a judgment in favor of the plaintiffs.

128 Wherefore, said Lucino Almeida Chantangco and Enrique Lete pray that the judgment of the Supreme Court of the Philippine Islands be reversed and the cause be remanded to that Court with instructions to render judgment against the defendant.

(Sgd.) W. A. KINCAID,
Attorney for the Plaintiffs in Error.

129 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Judges of the Supreme Court of the Philippine Islands, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the Philippine Islands, before you, or some of you, between Lucino Almeida Chantangco and Enrique Lete, plaintiffs and appellants, and Eduardo Abaroa, defendant and appellee, a manifest error hath happened to the great damage of the said Lucino Almeida Chantangco and Enrique Lete, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, we command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the 14th day of August, 1907, in the said Supreme Court to be then and there held,
130 that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the law and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States the 16th day of April in the year of Our Lord, 1907.

[Seal Corte Suprema, Islas Filipinas.]

J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands.

The foregoing writ of error is allowed and it shall operate as a supersedeas of the judgment complained of, upon the execution of a bond by Lucina Almeida Chantangco and Enrique Lete in the sum of Five Hundred Dollars, payable to the defendant in error, conditioned as required by law, to be approved by me, pending such writ of error.

E. FINLEY JOHNSON,
Associate Justice of the Supreme Court of the Philippine Islands.

131 UNITED STATES OF AMERICA:

Supreme Court of the United States.

LUCINO ALMEIDA CHANTANGCO ET AL., Plaintiffs in Error,
versus
EDUARDO ABAROA, Defendant in Error.

Know all men by these presents, that we, Jacinto Saez, Chan Jong To and Alfonso Saez Chan Cok Ching, as sureties of Lucino Almeida *et al.*, plaintiffs in error, are held and firmly bound unto Eduardo Abaroa, defendant and appellee above named, in the sum of One Thousand pesos (P. 1,000.00) Philippine Currency, to be paid to the said Eduardo Abaroa their successors, executors or administrators, to which payment well and truly to be made we bind ourselves and each of us jointly and severally and our and each of our successors, representatives and assigns firmly by these presents.

Sealed with our seals and dated the 10th day of July, 1907.

Wherefore the above named plaintiffs Lucino Almeida Chantangco *et al.*, have sued out a writ of error to the Supreme Court of

the United States to reverse the judgment in the above entitled cause by the Supreme Court of the Philippine Islands.

Now, therefore, the condition of this obligation is such that if the above named Lucino Almeida Chantangco *et al.*, shall prose-
132 cute said writ to effect and answer all costs and damages if they shall fail to make good this plea, then this obligation shall be void; otherwise to remain in full force and effect.

(Signed) JACINTO SAEZ, J. A.
" ALFONSO SAEZ CHAN COK CHENG.

The foregoing bond is approved:

(Sgd.) E. FINLEY JOHNSON,
One of the Justices of the Supreme Court of the Philippine Islands.

UNITED STATES OF AMERICA,
Philippine Islands, City of Manila:

I, Roberto Moreno, a Notary Public in and for the City aforesaid, do certify that Jacinto Saez Chan Jon To and Alfonso Saez Chan Cok Ching, are personally known to me, whose names are signed to the foregoing obligation, executed the same in my presence and made affidavit that after the payment of all of their own debts and those that they are likely to have to pay as security for others they are worth more than the sum of One Thousand ($1,000.00) pesos, Philippine Currency, over and above all exemptions. Affiants presented cedula No. A. 619, issued at Manila, P. I. 2nd January, 1907 and No. A. 159078 issued at Manila, P. I. 16th January, 1907, respectively.

Given under my hand and official seal this 10th day of July, 1907.

[NOTARIAL SEAL.]

(Signed) ROBERTO MORENO,
Notary Public.

El Nombrimiento Termino el *el* de Diciembre de 1909. (My appointment expires December 31, 1909.)

133 [Stamp]: Supreme Court of the Philippines, Clerk's office. Filed Jun 8, 1907, 10.00 A. M.

UNITED STATES OF AMERICA, *ss:*

To Eduardo Abaroa or His Attorney:

You are hereby cited and admonished to be in and appear at the Supreme Court of the United States, to be holden at Washington, within one hundred and twenty days from the date of this citation, pursuant to a Writ of Error filed in the Clerk's office of the Supreme Court of the Philippine Islands, wherein Lucino Almeida Chantangco and Enrique Lete are plaintiffs in error, and Eduardo Abaroa

defendant in error, to show cause if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 16th day of April in the year of Our Lord 1907.

[Seal Corte Suprema, Islas Filipinas.]

E. FINLEY JOHNSON,
Associate Justice of the Supreme Court of the Philippine Islands.

I admit the receipt of a copy of the above citation and accept service thereof as though regularly had this — day of —— 1907.

WADE H. KITCHENS,
Attorney for Defendant in Error.

134 THE UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

I, R. Heras, Acting Clerk of the Supreme Court of the Philippine Islands, do hereby certify that in a certain cause pending in said Court, wherein Lucino Almeida Chantangco and Enrique Lete, were appellants, and Eduardo Abaroa was appellee, a final judgment was rendered by said Supreme Court on the second day of April, A. D. 1907, in favor of the said Eduardo Abaroa, and against the said Lucino Almeida Chantangco and Enrique Lete, and that on the sixteenth day of April, A. D., 1907, said Lucino Almeida Chantangco and Enrique Lete, sued out a writ of error to said Supreme Court, directed to remove said cause to the Supreme Court of the United States.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Supreme Court, at Manila, P. I., this seventh day of September, A. D. 1907.

[Seal of Supreme Court.]

(Sgd) R. HERAS, *Acting Clerk.*

135 THE UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

I, J. E. Blanco, Clerk of the Supreme Court of the Philippine Islands, do hereby certify that the foregoing pages constitute a true and correct transcript of the record and proceedings in the case of Lucino Chantangco and Enrique Lete, plaintiffs in error, against Eduardo Abaroa, defendant in error.

In witness whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of the Philippine Islands this ninth day of January, A. D. One thousand nine hundred and eight.

[Seal Corte Suprema, Islas Filipinas.]

J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands.

Endorsed on cover: File No. 21,018, Philippine Islands, supreme court. Term No. 277. Lucino Almeida Chantangco and Enrique Lete, plaintiffs in error, *vs.* Eduardo Abaroa. Filed February 12th, 1908. File No. 21,018.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 73.

LUCINO ALMEIDA CHANTANGCO and ENRIQUE LETE, Plaintiffs in Error,
vs.
EDUARDO ABAROA.

In the above case, it is hereby stipulated that the attached judgments, rendered by the Court of First Instance and the Supreme Court of the Philippine Islands, respectively, in the cause entitled, "The United States *vs.* Eduardo Abaroa" may be made part of the record in this cause, and considered as fully as if incorporated into the original transcript upon the writ of error, it appearing from such transcript that said judgments, whereof copies are hereto attached, were part of the record in this cause in the several courts below.

And it is further stipulated that the evidence introduced in the trial of this cause showed the appearance of a private prosecutor in the Supreme Court of the Philippine Islands on behalf of Lucino Almeida Chantangco in the case of The United States *vs.* Eduardo Abaroa, cause No. 1423 of that Court."

ALDIS B. BROWNE,
ALEX. BRITTON,
W. A. KINCAID,
Attorneys for Plaintiffs-in-Error.
W. H. BARD,
Attorney for Defendant-in-Error.

THE UNITED STATES OF AMERICA:

In the Court of First Instance of La Union.

San Fernando, June 3, 1903.

Criminal Cause No. 282.

Arson.

THE UNITED STATES
vs.
THE CHINAMAN EDUARDO ABAROA.

Judgment.

The evidence introduced by the prosecution indicates that the defendant might have been the author of the crime, but it is not con-

clusive. All persons charged with crime are presumed to be innocent until they are proven otherwise. There being in my mind some doubt as to the guilt of the defendant, I should and do hereby *hereby* acquit him, with the costs of these proceedings *de oficio,* and the attachment heretofore levied on his property is hereby vacated, reserving to the complaining witness whatever right he may have to bring a civil action against the said Eduardo Abaroa.

(Signed) ARTHUR F. ODLIN, *Judge.*

PHILIPPINE ISLANDS,
City of Manila, ss:

I, J. E. Blanco, Clerk of the Supreme Court of the Philippine Islands, do hereby certify that I have examined the foregoing document, that I have compared same with the original on file in my office, and that the same is a true and correct copy thereof.

In witness whereof I have hereunto signed my name and affixed the seal of the said Supreme Court, this third day of November, nineteen hundred and eight.

J. E. BLANCO,
Clerk Supreme Court of the Philippine Islands.

[Seal Corte Suprema, Islas Filipinas.]

THE UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

No. 1423.

THE UNITED STATES, Complainant and Appellant,
vs.
EDUARDO ABAROA, Defendant and Appellee.

MCDONOUGH, *J.:*

This is an appeal from the judgment of the Court of First Instance of the Province of La Union, acquitting the defendant on a charge of *incendio* (arson), alleged to have been committed by him on the night of March 1, 1903, in San Fernando de la Union. The camarin of one Lucino Almeida Chan Tanco, otherwise called Tana, was burned on that night. It was claimed that Eduardo Abaroa Chan-Em, the accused here, had set fire to the house, and he was arrested and put upon trial at San Fernando de la Union on June 3, 1903.

After 11 witnesses had been sworn and had testified in behalf of the prosecution and 47 pages of testimony taken the court discharged the accused for the reason that the prosecution had not made out a case against him.

It was proved satisfactorily that the building and its contents, a stock of goods, valued altogether at about 60,000 pesos, Mexican currency, were destroyed by fire, but the testimony adduced to show that the accused set the building on fire was not direct and positive, but

rather of a circumstantial and contradictory nature, and which, apparently, was not strong enough to convince the learned judge who tried the case of the guilt of the accused.

After carefully reading the evidence and considering its bearing and weight we have concluded that the judgment of the Court of First Instance should be affirmed.

We do not, however, approve of the practice adopted of dismissing the case, on motion of the attorney for the accused, when the fiscal announced that he had no more testimony to offer.

Such practice should not be followed for the reasons (1) if this court should not agree with the conclusion reached by the court below it would be authorized to reverse the judgment and enter judgment convicting the accused upon the facts proved by the prosecution, and thus depriving the accused of making a defense below, if he had a defense, and (2) if this court, on disapproval of the judgment below, should order a new trial the result would be that the prosecution would be obliged to place the defendant on trial twice, when all the evidence could have been obtained in one trial; and the defendant would have the benefit of delay and the possible death or disappearance of witnesses for the prosecution.

We are of opinion, therefore, that the better practice is to require the defendant to make his defense, if he desires to offer evidence in his own behalf, and not to dismiss the case, on motion, until both parties have presented all their evidence.

The judgment below is affirmed with the costs of both instances *de oficio*.

(Signed) ARELLANO, *C. J.*

Torres, Cooper, Willard and Mapa, JJ., concurring.

Mr. Justice Johnson concurs in the result only.

PHILIPPINE ISLANDS,
City of Manila, ss:

I, J. E. Blanco, Clerk of the Supreme Court of the Philippine Islands, do hereby certify that I have examined the foregoing document, that I have compared same with the original on file in my office, and that the same is a true and correct copy thereof.

In witness whereof I have hereunto signed my name and affixed the seal of the said Supreme Court, this third day of November, nineteen hundred and eight.

[Seal Corte Suprema, Islas Filipinas.]

J. E. BLANCO,
Clerk Supreme Court of the Philippine Islands.

[Endorsed:] File No. 21018. Supreme Court U. S. October Term, 1909. Term No. 73. Lucino Almeida Chantangco *et al.*, pl'ffs in error, *vs.* Eduardo Abaroa. Stipulation of counsel & addition to record. Filed June 10th, 1909.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 2.

LUCINO ALMEIDA CHANTANGCO AND ENRIQUE LETE, PLAINTIFFS IN ERROR,

vs.

EDUARDO ABAROA.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

Statement of the Case.

The death of the defendant in error since issue of this writ was suggested at the late term. Order of publication was passed and due proof of publication thereof made and filed.

The plaintiffs in error brought an action against the defendant in error in the Court of First Instance of La Union, Third Judicial District, Philippine Islands, for the recovery of the sum of $58,473.49½, the value of a certain building

called a storehouse and sales store, situated in the city of San Fernando of La Union, and of the stock of goods contained in the same, which said building and stock of goods were alleged to have been burned maliciously or unlawfully by the defendant on March 1, 1903 (R., 1-2).

In his answer the defendant denied all the allegations of the complaint, and averred, specially, that the alleged cause of action had been already adjudicated in his favor in a criminal action against him "over the fire and damages alleged in the complaint," in which criminal action Lucino Almeida, one of the plaintiffs, was private complainant "and therefore the action brought is *res adjudicata*" (R., 2-4).

At the trial counsel for the plaintiffs, before going into the evidence on the merits, moved the court to rule on the plea of *res adjudicata* set up in the defendant's answer, and in support of the motion submitted certified copies of the judgments rendered by the Court of First Instance and the Supreme Court, respectively, in the criminal action referred to, which copies were received and made a part of the record (R., 20), being the only parts of the record in the criminal action which form any part of the record here. They show that in the Court of First Instance the criminal action was styled "The United States *vs.* The Chinaman Eduardo Abaroa," and the judgment therein was as follows:

> "The evidence introduced by the prosecution indi-
> " cates that the defendant might have been the author
> " of the crime, but it is not conclusive. All persons
> " charged with crime are presumed to be innocent
> " until they are proven otherwise. There being in
> " my mind some doubt as to the guilt of the defend-
> " ant, I should and do *hereby* acquit him, with the
> " costs of these proceedings *de officio*, and the attach-
> " ment heretofore levied on his property is hereby
> " vacated, reserving to the complaining witness what-
> " ever right he may have to bring a civil action against
> " the said Eduardo Abaroa." (Supp. R.)

In the Supreme Court of the Islands the case was styled "The United States, complainant and appellant, *vs.* Eduardo Albaroa, defendant and appellee," and the judgment, as far as material to be here stated, was as follows:

> "This is an appeal from the judgment of the Court " of First Instance of the Province of La Union, ac- " quitting the defendant on a charge of *incendio* " (arson), alleged to have been committed by him on " the night of March 1, 1903, in San Fernando de la " Union. The camarin of one Lucino Almeida " Chan Tanco, otherwise called Tana, was burned " on that night. It was claimed that Eduardo Abaroa " Chan-Em, the accused here, had set fire to the house, " and he was arrested and put upon trial at San Fer- " nando de la Union on June 3, 1903.
>
> "After 11 witnesses had been sworn and had testi- " fied in behalf of the prosecution and 47 pages of " testimony taken the court discharged the accused " for the reason that the prosecution had not made out " a case against him.
>
> "It was proved satisfactorily that the building and " its contents, a stock of goods, valued altogether at " about 60,000 pesos, Mexican currency, were de- " stroyed by fire, but the testimony adduced to show " that the accused set the building on fire was not " direct and positive, but rather of a circumstantial " and contradictory nature, and which, apparently, " was not strong enough to convince the learned judge " who tried the case of the guilt of the accused.
>
> "After carefully reading the evidence and consid- " ering its bearing and weight we have concluded that " the judgment of the Court of First Instance should " be affirmed." (Supp. R.)

There is a stipulation by counsel that the evidence in this case showed the appearance of a private prosecutor in the criminal action, after it reached the Supreme Court, on behalf of Lucino Almeida Chantangco, one of the plaintiffs here. It does not appear that there was any appearance for either of the plaintiffs in the Court of First Instance, or that the complaint or information in that case was other than dis-

tinctly and solely a criminal complaint or information by the United States for the specific crime alleged.

In this connection we call attention to the fact that since the judgment by the Supreme Court on the Government's appeal in the criminal action was rendered this court has held that in a criminal case the United States is without right of appeal from a judgment of acquittal in a Court of First Instance in the Philippine Islands (*Kepner vs. United States,* 195 U. S., 100). This is important as bearing on the question of the effect to be given the appearance by the private prosecutor in the Supreme Court in support of the appeal in the criminal action, a matter hereinafter discussed.

Passing upon the motion of counsel for plaintiffs, the court overruled the defendant's plea of *res adjudicata,* and thereupon evidence on the merits was introduced on both sides (R., 20-64).

April 24, 1905, the court rendered its judgment, in which, after a somewhat extended discussion of the plea of *res adjudicata,* its findings and judgment were stated as follows (R., 4-9):

> "The court finds that:
>
> "1. The plaintiffs do not allege in their complaint " that the defendant was convicted of the crime al- " leged therein to be the basis of action.
>
> "2. The plaintiffs do not allege in the complaint " that they reserved their right to bring this distinct " civil action to recover damages resulting from the " alleged commission of the criminal act.
>
> "3. The evidence in this case does not establish a " conviction in the criminal action, but on the con- " trary shows an acquittal of the defendant.
>
> "4. The evidence in this case does not show that " plaintiffs reserved their right to institute this sep- " arate civil suit to recover the alleged damages re- " sulting from the alleged criminal act, but it shows " the contrary.
>
> "5. The evidence shows, and the court so finds, " that the plaintiffs have had their day in court; that " they reserved no right, but that one of them, at

"least, appeared by counsel, Mr. Felipe D. Calderon,
"in the Supreme Court, on appeal, to assert that right
"and claim to indemnification; and the presumption
"is that he did so, in the fullest measure of his duty.

"Wherefore the court decides that:

"A. The complaint does not state facts sufficient to
"constitute a cause of action. (See sec. 93, act 190.)

"B. That the evidence adduced on the trial does
"not establish facts sufficient to constitute a cause of
"action so as to allow an amendent of the complaint.

"C. As a legal consequence the plaintiffs must fail,
"and the court holds that they are not legally entitled
"to recover in any sum, irrespective of the character
"and weight of the other evidence in the case.

"The court, therefore, renders judgment in favor
"of the defendant and orders and adjudges that the
"plaintiffs pay the costs of this action."

The plaintiffs duly excepted, and subsequently filed two motions for a new trial, alleging in substance that the judgment was contrary to law and the evidence; that on the proofs presented the plaintiffs were entitled to judgment in their favor, and, in special representation of the plaintiff Enrique Lete, who had not been represented in the criminal action at all, that the effect of the judgment was to deprive him of his property without right of defense (R., 10-11).

May 31, 1905, the court overruled the motions and the plaintiffs again excepted. On a bill of exceptions, duly approved, the case was carried to the Supreme Court of the Philippine Islands (R., 11-64). That court on March 11, 1907, affirmed the judgment below (R., 64-73; 8 Phil. Rep., 178). The plaintiffs filed petition for rehearing, which being denied (R., 68-69), writ of error was issued from this court (R., 74-76).

The decision of the Supreme Court of the Philippine Islands is based upon the theory that the acquittal of Abaroa in the criminal prosecution, and his consequent exemption from criminal responsibility, was likewise and equally an adjudication in his favor on the question of his civil responsibility to the owners of the building and its contents de-

stroyed by the fire. In the course of its opinion, after stating that its conclusions were in enlargement of and in addition to the findings contained in the judgment of the Court of First Instance, the Supreme Court, among other things, said (R., 70-73):

> "The defendant, Abaroa, having been acquitted of "the charge against him as the supposed author of "the crime of arson, cannot be made a defendant, "nor can judgment be rendered against him, by "reason of a civil action, for the payment of the "amount of the loss and damages caused to the "plaintiffs by said fire.
>
> * * * * * * *
>
> "It cannot be conceived legally that an act of set- "ting fire executed intentionally is not constitutive "of the crime of arson, and that its author, without "being found personally responsible according to the "penal law, is to be only civilly responsible therefor.
>
> "The reparation for damage and the indemnity for "losses suffered and claimed by the plaintiffs against "the defendant are derived from the act itself in the "supposition that the fire was caused intentionally, of "which accusation the said defendant was acquitted "in a criminal cause, and it follows that if the de- "fendant was not the author of the crime, under no "condition can he be held responsible and liable for "the evil and loss occasioned by the criminal act.
>
> * * * * * * *
>
> "For these reasons, in addition to those set forth in "the judgment appealed from, the said judgment is "affirmed."

Assignment of Errors (R., 75).

I.

The court erred in holding that a former judgment of acquittal rendered in a criminal action was decisive of the civil action exercised in the present case.

II.

The court erred in holding that a judgment of conviction for the offense of "incendio" was an indispensable prerequisite to the rendition of a judgment in favor of the plaintiffs for the damages caused by the burning of the "camarin," store and effects.

III.

In view of the evidence admitted at the trial, the court erred in not rendering a judgment in favor of the plaintiffs.

ARGUMENT.

I.

There was no determination in the criminal action of the matter in controversy in this action such as to warrant the application of the principle of res adjudicata. A judgment in a criminal action is not evidence in a civil action to support the defense of former adjudication, even though both actions involve the same subject-matter or transaction.

The law on the subject is well settled. In *Greenleaf on Evidence* (Vol. 1, sec. 537) that author says:

> "As a general rule, a verdict and judgment in a "*criminal case*, though admissible to establish the "fact of the mere *rendition* of the judgment, cannot "be given in evidence in a civil action, to establish "*the facts on which it was rendered.* If the defend- "ant was convicted, it may have been upon the evi- "dence of the very plaintiff in the civil action; and "if he was acquitted, it may have been by collusion "with the prosecutor. But besides this, and upon "more general grounds, there is no mutuality; the

> " parties are not the same; neither are the rules of " decision and the course of proceeding the same. " The defendant could not avail himself, in the crimi- " nal trial of any admissions of the plaintiff in the " civil action; and, on the other hand, the jury in the " civil action must decide upon the mere preponder- " ance of evidence; whereas, in order to a criminal " conviction, they must be satisfied of the party's " guilt, beyond any reasonable doubt. The same " principles render a judgment in a *civil action* in- " admissible evidence in a criminal prosecution."

In *Jones on Evidence* (sec. 589, page 745) the rule is stated thus:

> "Although the same fact may be involved in two " cases, one civil and the other criminal, the parties " are *necessarily different,* for one action is prose- " cuted by an individual and the other by the State; " and judgment in one case is not generally admis- " sible in another to establish the facts on which it is " rendered."

In *Wharton on the Law of Evidence* (Vol. 1, sec. 776) that author says:

> "The parties in a criminal prosecution being neces- " sarily different from those in a civil suit, and the " objects of the two forms of action, and the redress " they afford being essentially distinct, it stands to " reason that a judgment in a criminal suit cannot be " used in a civil suit, to establish the facts on which " such judgment rests."

In *Herman on Estoppel*, sec. 413, the principle is stated thus:

> "It may therefore be stated as a general rule that while a judgment and verdict in a criminal case may be and is admissible and conclusive evidence in regard to its own rendition, it cannot be used in a civil action to establish a fact upon which it was rendered. For the obvious reason that the party may have been

convicted upon the evidence of the very plaintiff in the civil action; if acquitted it may have been by collusion with the prosecutor. There is no mutuality; the parties are not the same. Estoppel should be reciprocal; nor is the manner of proceeding the same, nor can the defendant in the criminal action avail himself of any admission the plaintiff in the civil action might make; and the jury in the criminal trial must be satisfied of the party's guilt, while in the civil action the verdict is rendered generally on the mere preponderance of evidence; and for the same reason it must be clearly apparent that a judgment in a civil action cannot be used in a criminal proceeding."

Other text writers state the rule to the same effect. In *Black on Judgments* (Vol. 2, sec. 529) it is said:

> "Since the parties to a criminal prosecution, and
> " those in a civil suit are necessarily different, and as
> " the objects and results of the two proceedings and
> " the rules of evidence which apply to them respec-
> " tively are equally diverse, it follows that the judg-
> " ment in the former cannot be used by way of
> " estoppel in the latter, save for the single purpose of
> " proving its own existence, if that becomes a relevant
> " fact."

In *Freeman on Judgments* (Vol. 1, sec. 319) that author, after stating the general rule substantially as given by Mr. Black, further says:

> "The chief reason for excluding the record of a
> " criminal prosecution from evidence in a civil case,
> " is that the parties to the two proceedings are differ-
> " ent. One who has been damaged by some criminal
> " act by another has a claim for remuneration, inde-
> " pendent of the right of the public to proceed against
> " the offender, and to inflict the penalty prescribed by
> " law. This right to compensation in damages ought
> " not to be, and is not, dependent on the success or
> " failure of the prosecution conducted by the people.
> " If it were, the party most injured would be preju-

> " diced by a proceeding to which he was not a party
> " and which he had no power to control."

There are many decided cases on the subject, both in England and in America, and they fully sustain the views of the text writers. Such has been the rule in England from an early day, and it has always been the law in this country.

In *King vs. Boston* (4 East., 572, 1804) the question was whether in an indictment for perjury the person injured by the perjury was interested in the result of the prosecution, and thereby, under the then existing rule, disqualified as a witness for the King; and it was held that the prosecutor could not avail himself of the conviction of the defendant, in a civil proceeding between them, and therefore he was not so interested in the criminal proceeding as to disqualify him as a witness in the case.

In *Jones vs. White* (1 Strange, 67-68, a very old case), it was held by Eyre, J., that—

> "A verdict on an indictment of battery cannot be
> " read in an action for the same battery."

and by Pratt, J., that—

> "If a verdict be given in evidence, it must be be-
> " tween the same parties; and therefore an indict-
> " ment, which is at the suit of the King, cannot be
> " read in an action which is at the suit of the party."

In Buller's *Nisi Prius*, it is said, at page 233:

> "For no record of conviction or verdict shall be
> " given in evidence, but such whereof the benefit may
> " be mutual, viz: such whereof the defendant, as well
> " as the plaintiff, might have made use, and give it in
> " evidence in case it made for him; therefore a con-
> " viction at the suit of the King for a battery, cannot
> " be given in evidence in trespass for the same bat-
> " tery."

We cite also—

Petrie vs. Nuttall, 11 Ex. Cheq., 569.

Justice vs. Gosling, 12 C. B., 39-44.

In *Cottingham vs. Weeks* (54 Ga., 275) it was held that in an action by a widow to recover damages for the killing of her husband, the record of the acquittal of the defendant under an indictment for the murder of the husband is not evidence for the defendant in the civil suit, and that a plea of such acquittal is not good. In its opinion the court said:

> "We have looked carefully into the authorities for " cases or principles to sustain the right to introduce " this judgment in the criminal case as evidence in " the civil one. It is not between the same parties; " different rules as to the competency of witnesses and " as to the weight of evidence necessary to the find- " ings, exist. Besides, the present plaintiff was in no " sense a party; she had no part nor lot in it; she " could not even examine or cross-examine a witness. " Suffice it that there is, so far as we can find, no case " to be found to sustain the introduction. * * * " That the State has had a verdict of not guilty " against it can be no evidence against the plaintiff, " and the plea to that effect is wholly irrelevant."

Marceau vs. Travelers Insurance Co. (101 Cal., 338) was an action on an insurance policy. The insured, whose name was Fiske, had been shot and killed by one Stillman. The policy contained a clause declaring it invalid if death resulted from "intentional injury" inflicted by the insured or any other person. Stillman had been previously indicted, tried, and convicted of the murder of Fiske. The plaintiff claimed that Stillman was insane when he killed Fiske, and therefore the death did not result from "intentional injury" within the meaning of the policy. The insurance company conceded that if Stillman was insane when he fired the fatal shot the policy was in full force and effect, and it was attempted in the company's defense, as against the insanity claim, to show by the judgment roll in the criminal case that Stillman had been convicted of the murder of Fiske. But this was refused on the ground that the record of the conviction was not evidence against the plaintiff, who was a

stranger thereto. The plaintiff had judgment, and the judgment was sustained on appeal.

We cite also—

Burke vs. Wells, Fargo & Co., 34 Cal., 60-62.
Cluff vs. Insurance Co., 99 Mass., 317.

The case of *Morch vs. Raubitschek* (159 Pa. St., 559), was a warrant of arrest in aid of a civil action under the terms of the State statute. The arrested defendant was discharged, not by the judge who issued the warrant of arrest, but by another judge of the same court, upon proof that he had been tried and acquitted in a criminal action involving the same transactions. On *certiorari* from the Supreme Court of the State, the action below was reversed and set aside. The court ruled that the discharging judge was without jurisdiction in the case, and further held as follows:

> "But assuming, for argument's sake merely, that "he had jurisdiction, we think there was error in dis- "charging the defendant because he had been tried "and acquitted of a criminal offense growing out of "the same transactions that were set forth in the com- "plaint on which the warrant of arrest in this case "was issued. The proceedings are entirely different. "The former was a criminal prosecution while this "is a civil proceeding, at the instance of defendant's "creditors. Defendant's acquittal of the criminal "charge cannot, in the nature of a plea of *autre fois* "*acquit* be imposed as a bar to the civil proceeding."

In *Betts vs. New Hartford* (25 Conn., 180) it was held that a judgment rendered in a criminal action is not admissible in evidence in a civil cause, although the same questions of fact may be in issue in both; and this upon the ground that the judgment in a criminal case is not evidence of the facts upon which it was rendered, when those facts come up in a civil case.

The case of *Corbley vs. Wilson* (71 Ill., 209) was an action of slander for charging the plaintiff with the commission of

a crime. The plaintiff had been previously acquitted in a criminal prosecution for the same crime. It was held that the judgment of acquittal was not admissible in evidence either to prove the falsity of the charge or to show malice In the course of its opinion the court said:

> "One objection is that the court permitted the
> " record of the criminal cause,—*The People vs. Wil-*
> " *son*—to be given in evidence to the jury against the
> " objection of the defendant. This was clearly error.
> " It is an axiom of the law, that no man should be
> " affected by proceedings to which he was a stranger—
> " to which, if he is a party, he must be bound. He
> " must have been directly interested in the subject-
> " matter of the proceedings—with the right to make
> " defense, to adduce testimony, and cross-examine the
> " witnesses on the other side, to control in some degree
> " the proceedings, and to appeal from the judgment."

After pointing out certain exceptions to the general rule, and stating cases illustrating the character of such exceptions, the court further said:

> " The record in this case was of a character entirely
> " different. It was a public prosecution, in conduct-
> " ing which the defendant had no agency or power,
> " or rights, or interests at stake. It would be sub-
> " versive of justice to allow such testimony. What
> " could be more efficacious toward a recovery by
> " plaintiff than to show that he had been indicted and
> " tried for the crime and acquitted? Does this bind
> " the defendant and defeat his plea that the charge
> " was true? So far as the defendant in the indict-
> " ment and the people are concerned, the record can
> " speak anywhere and everywhere, and its tones must
> " be heard. But, on what principle is it that defend-
> " ant should not be permitted to prove the charge,
> " notwithstanding the verdict in the criminal trial?
> " Though that is conclusive between the parties, it is
> " not true as against the defendant."

In *Johnson vs. Girdwood* (143 N. Y., 660-661; s. c. 28 N. Y. Supp., 151), it was held that a judgment of conviction

in a criminal court is conclusive only between the parties—that is, the State and the defendant; but is no estoppel as between the defendant and strangers to the record.

See also—

Chamberlain vs. Pierson (87 Fed. Rep., 420-424).

In *Dyer County vs. Railroad Co.* (87 Tenn., 712) it was held that the acquittal of a railroad company of the criminal charge of maintaining a nuisance in the public road at its crossing is not available as *res adjudicata* in a suit by the county to recover from the railroad company the cost of removing the obstruction constituting the nuisance; and the ruling was on the ground that the parties in the two actions were not the same in fact, or in privity of interest, and furthermore because an adjudication in a criminal prosecution is not a bar to a civil action involving the same alleged facts upon which the criminal prosecution was based.

In *United States vs. Jaedicke* (73 Fed. Rep., 100) it was held that the acquittal of a defendant under an indictment for making fraudulent and false returns as postmaster of the business done at his office, for the purpose of increasing his compensation, is no bar to an action by the United States upon the bond of the defendant as such postmaster to recover the amount found due the Government from the defendant upon the adjustment of his accounts, based upon the same returns. The court there said (page 104):

> "In the criminal case it was necessary to prove that
> "the returns were not only false, but that they were
> "falsified by the defendant, and with the fraudulent
> "intent of increasing his compensation beyond the
> "amount allowed him by law. The amount sued
> "for in this case is not a forfeiture or penalty, but
> "simply a sum improperly withheld by the defendant
> "in excess of his legal compensation. Therefore,
> "neither the facts to be established nor the testimony
> "to be adduced are the same as required in the crim-
> "inal prosecution."

Van Hoffman vs. Kendall (17 N.Y.Supp., 713) was an action for the recovery of damages for the unlawful and willful cutting of trees from the lands of the plaintiff. The defendant had been tried and acquitted in a criminal prosecution upon the same charge, and he sought to interpose such acquittal as a defense in the civil action, but this was refused. The court held that as the people were the party in the criminal action the verdict was conclusive only as to the people, and it followed that even though the criminal prosecution failed, the right to damages remained; and a demurrer by the plaintiff to the plea alleging such acquittal as a defense was sustained.

The case of *United States vs. Schneider* (35 Fed. Rep., 107) was a civil action by the United States to recover an amount of special taxes alleged to be due from the defendant as "a wholesale dealer in malt liquors"; the United States had previously proceeded against the defendant in a criminal action to recover a penalty for the non-payment of similar taxes. In that action the case was submitted to the jury on the question whether the defendant was a "wholesale dealer in malt liquors," as charged, and there was a verdict for the defendant and judgment accordingly. In the civil action it was sought to interpose the former judgment as a bar, but the court held it was no bar, and that the Government was not estopped from alleging and proving in the civil action that the defendant was "a wholesale dealer in malt liquors," as therein alleged, notwithstanding the verdict and judgment to the contrary in the criminal action. The ruling was upon the theory that the quantum of proof required to prevail was not the same in the two actions; that in the criminal proceeding the defendant could not be convicted except upon evidence which established his guilt beyond any reasonable doubt, whereas, in the civil case, the verdict must be according to the preponderance of the evidence.

McDonald vs. Starke (176 Ill., 456) was a civil action. There was a plea by Starke that he had been previously prose-

cuted criminally for the same alleged acts and acquitted. The plea was overruled. The court held (page 468):

> "To make a former action *res judicata*, there must "be identity in the thing sued for; identity of the "cause of action, and identity of persons and parties "to the action. The criminal action was in the name "of the people of the State of Illinois, and not in the "name of the appellee Starke as an individual. "There was no identity in the action, and it cannot be "a bar to this action."

There are many other cases in which the principle has been applied: Thus, an acquittal of homicide is no bar to an action to recover damages for causing the death of the deceased. *Gray vs. McDonald*, 104 Mo. 303, 309-310. The conviction of a person is not evidence of his guilt in an action for false imprisonment brought by him. "This is because "neither the parties, nor the rules of decision, nor the course "of procedure are identical in the two actions." *Wilson vs. Manhattan Ry. Co.*, 20 N. Y. Supp., 852. The record of an acquittal of a crime is not admissible in an action for malicious prosecution based on the prosecution in which the acquittal was had. *Skidmore vs. Bricker*, 77 Ill., 164. A judgment of acquittal on an indictment for unlawfully and maliciously killing another's cattle is not admissible as evidence in a civil action for the value of the cattle. *Tumlin vs. Parrott*, 82 Ga., 732-735. An acquittal in a prosecution for incendiary burning is of no weight in an action brought by the accused on an insurance policy on the property burned. *Sibley vs. St. Paul F. & M. Ins. Co.*, 9 Biss., 31. In an action against a licensed dealer in intoxicating liquors for breach of the bond given by him to obey the statute regulating the sale of liquor, it was held no defense that the defendant had been acquitted in a criminal prosecution based on the same act alleged as the breach of the bond. *State vs. Carron*, 73 N. H., 434. In an action for dower one of the defendants answered that she and not the plaintiff was the widow of the

deceased, whose name was Frierson. To support the answer the record and judgment of an acquittal in a criminal prosecution against Frierson, in which it was charged that his marriage to the defendant was bigamous because of a previous marriage to plaintiff, was offered in evidence, but excluded on the ground that a judgment in a criminal prosecution does not support the plea of *res adjudicata* in a civil action. *Frierson vs. Jenkins,* 72 S. Car., 341. See also *Britton vs. State,* 77 Ala., 202, 209; *State vs. Bradnack,* 69 Conn., 212, 214, 215; *People vs. Kenyon,* 93 Mich., 19, and note in Am. & Eng. Anno. Cases, vol. 5, pages 78-80.

The case of *Stone vs. United States* (167 U. S., 178) was a civil action by the United States against Stone for the recovery of damages for the value of a quantity of timber alleged to have been cut from the public lands. Stone had been previously prosecuted for cutting the timber in violation of the statute, but upon insufficient proof was acquitted, and he sought to interpose the judgment of acquittal as a conclusive defense in the civil action. This court held the evidence inadmissible, for the reason that the record in the criminal proceeding could not be evidence to establish or disprove any of the material facts involved in the civil action. In the course of its opinion the court said (pages 188-189):

> "In the present case the action against Stone is
> " purely civil. It depends entirely upon the owner-
> " ship of certain personal property. The rule estab-
> " lished in *Coffey's* case can have no application in
> " a civil case not involving any question of criminal
> " intent or of forfeiture for prohibited acts, but turn-
> " ing wholly upon an issue as to the ownership of
> " property. In the criminal case the Government
> " sought to punish a criminal offense, while in the
> " civil case it only seeks in its capacity as owner of
> " property, illegally converted, to recover its value.
> " In the criminal case his acquittal may have been
> " due to the fact that the Government failed to show,
> " beyond a reasonable doubt, the existence of some
> " fact essential to establish the offense charged, while

> " the same evidence in a civil action brought to re-
> " cover the value of the property illegally converted
> " might have been sufficient to entitle the Govern-
> " ment to a verdict.
>
> * * * * * * *
>
> "It cannot be said that any fact was conclusively
> " establish in the criminal case, except that the de-
> " fendant was not guilty of the public offense with
> " which he was charged. We cannot agree that the
> " failure or inability of the United States to prove in
> " the criminal case that the defendant had been guilty
> " of a crime, either forfeited its right of property in
> " the timber or its right in this civil action, upon a
> " preponderance of proof, to recover the value of such
> " property."

In another part of its opinion the court referred to and distinguished the case of *Coffey vs. The United States* (116 U. S., 436-444). That was a proceeding, by libel, on behalf of the United States against certain personal property alleged to have been forfeited to the Government on account of the violation of certain statutes. Coffey set up a claim to most of the property, filed an answer of general denial, and interposed a plea that before the institution of the libel proceedings a criminal information was filed against him which involved the same charges and matters contained in the libel proceedings, and that upon trial of the criminal information he was acquitted. The question was whether the judgment of acquittal was a bar to the forfeiture proceedings. This court held that it was. It was there said (page 443):

> "Where an issue raised as to the existence of the
> " act or fact denounced has been tried in a criminal
> " proceeding, instituted by the United States, and a
> " judgment of acquittal has been rendered in favor
> " of a particular person, that judgment is conclusive
> " in favor of such person, on the subsequent trial of a
> " suit *in rem* by the United States, where, as against
> " him, the existence of the same act or fact is the
> " matter in issue, as a cause for the forfeiture of the
> " property prosecuted in such suit *in rem*."

After referring to the similar case of *Gelston vs. Hoyt* (3 Wheat., 246), in which the same doctrine had been applied, the court further said (page 444):

> "This doctrine is peculiarly applicable to a case like " the present, where, in both proceedings, criminal " and civil, the United States are the party on one side " and this claimant the party on the other. The " judgment of acquittal in the criminal proceeding " ascertained that the facts which were the basis of " that proceeding, and are the basis of this one, and " which are made by the statute the foundation of " any punishment, personal or pecuniary, did not " exist. This was ascertained once for all, between " the United States and the claimant, in the criminal " proceeding, so that the facts cannot be again liti- " gated between them, as the basis of any statutory " punishment denounced as a consequence of the ex- " istence of the facts."

Other cases somewhat analogous to the *Coffey* case are those where the parties and facts in issue are the same, and the nature of the charge is the same, or similar, that is, criminal or quasi-criminal, in both actions.

At the trial of an indictment for an assault upon a police officer, committed while the defendant was under arrest for drunkenness, it was held that the record of a conviction and sentence of the defendant for drunkenness at the time of such assault was conclusive evidence of that fact. *Com. vs. Feldman,* 131 Mass., 588.

Cooper vs. Commonwealth (106 Ky., 909) was an indictment for perjury alleged to have been committed by Cooper in a prior criminal proceeding against him, at the trial of which he had testified as a witness in his own behalf, expressly denying the crime charged, and was acquitted. The court cited the *Coffey* case, *supra,* and held the acquittal a bar to the prosecution for perjury, on the theory that whether Cooper had sworn falsely in the prior case between the same

parties was a matter which had been in that case adjudicated in his favor by the verdict of acquittal.

In *State vs. Meek* (112 Iowa, 338) it was held that where the action is to recover a forfeiture which would have been part of the *penalty* imposed in the former criminal proceeding, *and is between the same parties*, the previous acquittal in the criminal action is a bar.

See also—

United States vs. Butler, 38 Fed. Rep., 498-499.
State vs. Adams, 72 Vt., 253.
Commonwealth vs. Ellis, 160 Mass., 165.

The foregoing authorities clearly establish the doctrine that, as a general rule, a judgment in a criminal action cannot be received as evidence to support a plea of *res adjudicata* in a subsequent civil action involving the same subject-matter. The chief reasons are (1) that the nature and course of procedure in the two actions are necessarily different; (2) that the parties are not the same, for one is prosecuted by the State and the other is prosecuted in individual right, and (3) that a different and higher degree of proof is necesary to justify a criminal conviction than is required to support a verdict in a civil action, for before there can be a conviction in a criminal case the evidence must satisfy the jury of the guilt of the defendant beyond any reasonable doubt; whereas, in a civil action, the jury are bound to decide upon a mere preponderance of the evidence.

The only exceptions to the rule, if indeed they may be termed exceptions, are instances where the civil action is of a quasi-criminal nature, and the purpose is to enforce a forfeiture or penalty as part of the punishment prescribed for the unlawful transaction which formed the basis of the criminal prosecution. In such instances the parties are the same in both actions and the subject-matter substantially the same.

We contend that the general rule is applicable to the pres-

ent controversy and must determine the issue in favor of the plaintiffs in error. The former action was wholly criminal in its nature, while this is purely a civil one; the parties are not the same; and the degree of certainty as to the proof required for conviction in the criminal action is not necessay to a verdict for damages against the defendant in this action, where a mere preponderance of the evidence must necessarily control.

The statement in the opinion of the Supreme Court of the Philippine Islands, to the effect that the defendant was acquitted from civil liability in the criminal action, as well as from criminal responsibility, we insist is unsound and is not the law. But as the statement is predicated upon certain provisions of the civil and penal codes, and of the law of criminal procedure, of the Islands, its further treatment is postponed to a later part of this brief, where those provisions are specifically discussed.

Even where both actions are of the same nature, as, for instance, both are civil actions, it is well settled that the principle of *res adjudicata* requires that there shall be identity of parties, either in fact or in privity of interest, as well as identity of the matter at issue.

In *Robins vs. Chicago City* (4 Wall., 657, 672) it was held by this court that the term "parties" includes only those "who " are directly interested in the subject-matter, and who had " a right to make defense, control the proceedings, examine " and cross-examine witnesses, and appeal from the judg- " ment. Persons not having those rights substantially are " regarded as strangers to the cause."

The principle was applied in *Amer. Bell Tel. Co. vs. National Telephone Co.*, 27 Fed. Rep., 657; *Frank vs. Weddecin*, 68 Fed. Rep., 818; *Weller vs. Hershey*, 89 Fed. Rep., 575, and *Houke vs. Cooper*, 108 Fed. Rep., 992.

In *Litchfield vs. Goodnow* (123 U. S., 549) it was held that one who was not a party to the suit in which the adjudication was had, but who interested himself in securing

the same and paid part of the expenses of the suit, was not bound thereby, and that those only who are parties, or who are represented by the parties, and claim under them or in privity with them, are bound by the judgment. To the same effect are the rulings in *Wilgus vs. Germain*, 72 Fed. Rep., 773, 775, and in *Hall vs. Finch*, 106 U. S., 261-265. And in *Stryker vs. Goodnow's Adm'r*, 123 Fed. Rep., 527, 540, it was held that the filing of a brief in a suit by a person interested in the question to be decided, but not a party to the suit, does not estop him in a suit of his own involving the same question.

In the case of *Southern Pacific R. R. Co. vs. United States* (168 U. S., 48-49) this court said:

> "The general principle announced in numerous
> " cases is that a right, question or fact distinctly put
> " in issue and directly determined by a court of com-
> " petent jurisdiction, as a ground of recovery, cannot
> " be disputed in a subsequent suit between the same
> " parties or their privies; and even if the second suit
> " is for a different cause of action, the right, question
> " or fact once so determined must, as between the
> " same parties or their privies, be taken as conclu-
> " sively established, so long as the judgment in the
> " first suit remains unmodified."

In *Russell vs. Place* (94 U. S., 606, 608) this court stated the doctrine as follows:

> "It is undoubtedly settled law that a judgment of
> " a court of competent jurisdiction, upon a question
> " directly involved in one suit, is conclusive as to that
> " question in another suit between the same parties.
> " But to this operation of the judgment it must ap-
> " pear, either upon the face of the record or be shown
> " by extrinsic evidence, that the precise question was
> " raised and determined in the former suit. If there
> " be any uncertainty on this head in the record,—as,
> " for example, if it appear that several distinct mat-
> " ters have been litigated, upon one or more of which
> " the judgment may have passed, without indicating

> "which of them was thus litigated, and upon which "the judgment was rendered,—the whole subject-"matter of the action will be at large, and open to a "new contention, unless this uncertainty be removed "by extrinsic evidence showing the precise point in-"volved and determined."

In *de Dollar vs. Hanscome* (158 U. S., 216, 221) the same principle was reaffirmed. See also *Last Chance Mining Co. vs. Tyler Mining Co.* (157 U. S., 683, 688); *New Orleans vs. Citizens' National Bank* (167 U. S., 371, 396-7), and *Pacific R. R. vs. United States* (183 U. S., 519, 528).

In *Greenleaf on Evidence* (Vol. 1, sec. 523) it is stated to be a most obvious principle of justice that no man ought to be bound by proceedings to which he was a stranger.

> "Under the term *parties*, in this connection, the "law includes all who are directly interested in the "subject-matter, and had a right to make defense, "or control the proceedings, and to appeal from the "judgment. This right involves also the right to "adduce testimony, and to cross-examine the wit-"nesses adduced on the other side. Persons not hav-'ing these rights are regarded as strangers to the "cause."

This statement of the doctrine by Greenleaf was cited with approval by this court in the case of *Lovejoy vs. Murray* (3 Wall., 1, 10); also in the case of *Litchfield vs. Goodnow, supra*, where it was said:

> "The correctness of this statement has been often "affirmed by this court: * * * and the prin-"ciple has been recognized in many cases."

Applying the doctrine to the matter under consideration in that case, the court, speaking of the former litigation relied on, further said, p. 551:

> "Mrs. Litchfield had no right to make a defense in "her own name, neither could she control the pro-

> "ceedings, nor appeal from the decree. She could "not in her own right adduce testimony or cross- "examine witnesses. Neither was she identified in "interest with any one who was a party. * * * "She was neither a party to the suit, nor in privity "with those who were parties; consequently she was "in law a stranger to the proceedings and in no way "bound thereby."

In this connection we call attention to article 1252 of the Civil Code of the Philippine Islands, which provides:

> "In order that the presumption of the *res adjudi- "cata* may be valid in another suit, it is necessary "that between the case decided by the sentence and "that in which the same is invoked, there be the "most perfect identity between the things, causes, "and persons of the litigants, and their capacity as "such."

We here refer also to the case of *Gaines vs. Hennen* (24 How., 553), in which the judgment in a former case (*Gaines vs. Relf and Chew*, reported in 12 How., 506) was sought to be interposed as a conclusive defense under the plea of *res adjudicata*. In its opinion this court referred to article 2265 of the Louisiana Code (the controversy having arisen in that State), which provided:

> "That the authority of the thing adjudged takes "place only with respect to what was *the object of the "judgment*. The thing demanded must be the same; "the demand must be founded on the same cause of "action; the demand must be made between the same "parties, and formed by them against each *other in "the same quality*."

It was then stated and held as follows (page 579):

> "The case in 12 Howard and that now under our "consideration are dissimilar as to parties and things "sued for, or what is called 'the object of the judg- "ment.' The suit now is not between Mrs. Gaines "and Relf and Chew, but between herself as com-

"plainant, and Duncan N. Hennen as defendant. "Nothing was said in the first suit of the claim of "Mrs. Gaines under the will upon which she now "sues, as in every particular detailed in the article "2265. There are differences between her present "cause of action and that formerly made, and the "demand now made is not between the same parties, "or formed against each in the same quality. And, "therefore, upon well-settled principles coincident "with the article 2265, and also independent of it, "nothing that was said or done in the case in 12 "How. can prejudice her claim as she now makes it."

It is interesting to observe the close similarity between the article 1252, quoted from the Civil Code of the Philippines, which is the Spanish law, and the article 2265, cited by the court from the Louisiana Code. While the two statutes differ in language, they are identical in purpose and substance.

Thus it is shown that even in cases where the present and former actions are both of the same nature—that is, both are civil actions—the principle of *res adjudicata* includes only parties to both proceedings, either in fact or in privity of interest, who had the right to make defense, to exercise control over the proceedings, to examine and cross-examine witnesses, *and to appeal from the judgment.* And in so far as by analogy the same principle may properly be applied in this case, the result must be in favor of these plaintiffs in error. They were in no sense parties to the criminal action in the Court of First Instance. They had no control over the proceedings in that action, for it is expressly provided that such proceedings shall be instituted by and shall be under the direction of the public prosecutor.

By article 105 of the Law of Criminal Procedure it is provided that—

"The public prosecutors are obliged to institute, "according to the provisions of law, all criminal "actions which they may consider proper, whether "there be a private accuser or not in the causes, ex- "cepting those which the Penal Code reserves exclu- "sively to private complaints."

And in section 107 of General Order No. 58, issued April 23, 1900 (quoted in full *infra*), it is declared, among other things, that in a criminal action it shall "be the duty of the " promotor fiscal to direct the prosecution, subject to the " right of the person injured to appeal from any decision of " the court denying him a legal right."

As the plaintiffs in error were not parties to the criminal action, they had, of course, no right of appeal from the judgment of the Court of First Instance in that action. And even if they had appeared in the criminal action, as provided in General Order No. 58, and as under the law prior to the issuance of said order persons injured or damaged by the commission of a crime were allowed to do in the Philippines, it is now practically settled, as subsequently shown in this brief, that the right of appeal by the injured or damaged persons in such cases has been taken away by the act of July 1, 1902.

By act No. 190, passed by the United States Philippine Commission in 1901, which has been since recognized as the law of civil procedure for the Philippine Islands, it is provided, in section 306, that the effect of a judgment is conclusive between the parties only "in respect to the matter directly adjudged." And by section 307 of the same act it is further provided as follows:

> "That only is deemed to have been adjudged in a " former judgment which appears upon its face to " have been so adjudged or which was actually or " necessarily included therein, or necessary thereto."

These sections are practically identical with sections 1908 and 1911 of the Code of Civil Procedure of the State of California, and doubtless had their origin in similar provisions of the Spanish law. They have been before the Supreme Court of the Islands for consideration in numerous cases. Among them are:

> *Planca Tanguinlay vs. Quinos et al.* (10 Phil. Rep., 360); *Merchant vs. International Bank* (9 Phil. Rep., 554); *O'Connell vs. Maygua* (8 Phil. Rep., 422).

The provisions seem to be in entire accord with the general rule on the subject as established by the decisions of this court.

In *Cromwell vs. County of Sac* (94 U. S., 351, 356) the court, speaking to this question, said:

> "It is not believed that there are any cases going to
> " the extent that because in the prior action a differ-
> " ent question from that actually determined might
> " have arisen and been litigated, therefore such pos-
> " sible question is to be considered as excluded from
> " consideration in a second action between the same
> " parties on a different demand, although loose re-
> " marks looking in that direction may be found in
> " some opinions."

In *Fayrweather vs. Ritch* (195 U. S., 276, 299) this court said:

> "Private right and public welfare unite in demand-
> " ing that a question once adjudicated by a court of
> " competent jurisdiction shall, except in direct pro-
> " ceedings to review, be considered as finally settled
> " and conclusive upon the parties. *Interest reipub-*
> " *licæ ut sit finis litium*. But in order to make this
> " finality rightful it should appear that the question
> " was distinctly put in issue; that the parties pre-
> " sented their evidence, or at least had an opportunity
> " to present it, and that the question was decided."

It not only does not appear from the face of the judgment in the criminal action here involved that the question of the defendant's civil liability was adjudicated, but it does expressly appear from the face of the judgment that such question was not adjudicated at all. True, it is claimed that under various sections of the Civil and Penal Codes, and of the Law of Criminal Procedure of the Philippine Islands (referred to in the opinion of the court below and discussed in a later part of this brief), the plaintiffs in error had the right to appear and press their claim for civil damages in the criminal cause in the Court of First Instance.

But the fact is they did not so appear, and it cannot be successfully claimed that they were obliged to assert their right to civil damages in that action. It is admitted that one of them appeared in the Supreme Court, but there is nothing to show that the claim for civil damages was there insisted upon or attempted to be adjudicated, and even if there had been such attempted adjudication it would have been a nullity, as is later shown in this brief, because there was no right of appeal by the United States in the criminal action, and the case was therefore improperly in the Supreme Court, and its judgment is to be treated as though it had never been rendered. But a discussion of that matter would be out of place here. What we are now insisting upon is that there is nothing to show that the question of defendant's civil liability was adjudged in the criminal action, even if it were conceded that it might have been, and therefore that question is not precluded from consideration in the present action.

Certain provisions of the Civil and Penal Codes and of the Law of Criminal Procedure, claimed to be still in force in the Philippine Islands, are next to be considered.

By article 1092 of the Civil Code, it is provided:

> "Civil obligations, arsing from crimes or misde-
> " meanors, shall be governed by the provisions of the
> " Penal Code."

By article 17 of the Penal Code it is provided that—

> "Every person criminally liable for a crime or mis-
> " demeanor is also civilly liable."

Articles 111 and 114 of the Law of Criminal Procedure provide: Article 111, that "actions which arise from a crime or misdemeanor may be instituted jointly or separately"; and article 114, in substance, that where a criminal action is instituted for the investigation of a crime or misdemeanor, no civil action arising from the same act *can be prosecuted*, but, if there be *one pending*, the same shall be suspended, in

whatever state it may be, until final sentence in the criminal proceeding is pronounced.

The Supreme Court of the Islands, in its opinion in this case, as illustrating in part the reasons for its judgment, stated as follows:

> "Instituting a criminal action only, it will be understood, brings the civil action as well, unless the damaged or prejudiced person waives the same or expressly reserves the right to institute the civil action after the termination of the criminal case, if there be any reason therefor."

Article 112 of the Law of Criminal Procedure is cited by the court as authority for the statement. That article provides:

> "If the criminal action only is instituted, it shall be understood that a civil action may also be brought, unless the person injured or prejudiced renounces the same or expressly reserves the right to institute it after the conclusion of the criminal action, if necessary."

How this language can be construed to justify the statement by the court, we are unable to understand. The article does not say, as claimed for it, that the bringing of a criminal action only, brings the civil action as well (unless the latter is waived, or the right to bring it is expressly reserved, etc.). On the contrary, it does say, in so many words, that "if the criminal action only is instituted, it shall be understood that a civil action may also be brought," unless the person injured or prejudiced renounces the civil action or expressly reserves the right to institute it; which clearly means that the criminal action does not necessarily embrace the claim for civil damages, and that an action for such damages may be brought separately from the criminal action. This view is fully sustained by articles 111 and 114 of the same Law of Procedure, the substance of which we have stated.

It thus appears that under the provisions referred to, if in

force in the Philippines as claimed, a party injured or damaged by the commission of a crime against his person or property is not obliged to assert his claim for damages in the criminal action for the punishment of the crime, but may institute and prosecute a separate action for the same.

The Supreme Court likewise refers to article 742 of the Law of Criminal Procedure, which after declaring in substance that in a criminal action the accused shall be condemned or acquitted not only of the principal offense charged, but also of any incidental offenses heard in the case, further provides that—

> "All questions relating to civil liability which may
> " have been the subject matter of the action shall also
> " be decided in the sentence."

Rule 51 of the Provisional Law for the application of the Penal Code, and article 144 of the Law of Criminal Procedure are also referred to. They are identical in terms, and provide simply that in a criminal action "an acquittal shall " be understood to be without reservation."

From these provisions the court concludes that the judgment whereby the defendant in this case was acquitted from criminal responsibility must be treated as having acquitted him from civil responsibility as well. This, notwithstanding the quoted language of article 742 plainly shows that it was intended to embrace only such questions of civil liability as should arise in the trial of the criminal action. Surely the judgment could not embrace any question that did not arise in the trial. As no question of civil liability was presented in the criminal action, the quoted provision from article 742 can have no application to the present controversy. The other provisions referred to simply mean that the acquittal shall be *final*—that is, final as to the crime of which the party is acquitted. The use of the words "without reservation," is but another way of expressing the condition of finality attached to the acquittal.

It is not claimed or pretended that the question of the defendant's civil liability for the destruction of the property of the plaintiffs was *in fact* adjudicated in the criminal action. And yet it has been in effect held both by the Court of First Instance and by the Supreme Court that the plaintiffs in error have had their day in court on that question; not upon any basis of fact, alleged or proved, but solely upon the theory that under a supposed legal fiction they are presumed to have been represented, and their claim to have been adjudicated against them, in the criminal action, to which they were not parties. Such fiction has its only foundation in what we contend is an erroneous interpretation of the aforesaid provisions cited from the Law of Criminal Procedure.

As a further reason for the judgment below, the Supreme Court states it to be a logical sequence of the provision of article 17 of the Penal Code, above quoted, that "the "exemption from criminal liability carries with it the ex- "emption from civil responsibility as well."

We submit that this is an erroneous interpretation of that provision. Article 17 simply declares a principle of law whose existence has been and is recognized, without any such declaration, in all civilized communities where reason and common honesty have their place in the administration of justice. The declaration was not necessary to establish the principle itself; and its purpose was rather to aid in carrying out other provisions of the Spanish law which recognize the right of a party injured in person or property by the commission of a crime, to appear in the criminal action for the punishment of the crime, should he so desire, and therein to prove the damage or loss sustained by the injury, and in case of conviction to have judgment for the same. Of those provisions article 112 of the Law of Criminal Procedure has been already quoted. Other provisions are as follows:

> "Art. 100. A criminal action arises from every "crime or misdemeanor for the punishment of the

"culprit, and a civil action may also arise for the "restitution of the thing, the repair of the damage, "and the indemnity of the losses caused by the pun- "ishable act."

"Art. 110. Those prejudiced by a crime or misde- "meanor who shall not have renounced their rights "may enter an appearance in the cause, should they "do so before the classification of the crime, and ex- "ercise the proper civil and criminal actions, or "either, as they may desire, without, however, caus- "ing any retrogression in the course of the proceed- "ings."

The right was also recognized by section 107 of General Order No. 58, hereinbefore referred to, which provides as follows:

"The privileges now secured by law to the person "claiming to be injured by the commission of an "offense to take part in the prosecution of the offense "and to recover damages for the injury sustained by "reason of the same shall not be held to be abridged "by the provisions of this order; but such person may "appear and shall be heard either individually or by "attorney at all stages of the case, and the court upon "conviction of the accused may enter judgment "against him for the damages occasioned by his "wrongful act. It shall, however, be the duty of the "promotor fiscal to direct the prosecution subject to "the right of the person injured to appeal from any "decision of the court denying him a legal right."

Article 17 should not be construed as intended to negative any existing legal right, unless such intention so plainly appears as to make it necessarily controlling. This is a familiar and well-established rule of interpretation and needs no citation of authority to support it. Evidently the article was not intended as a declaration of a fundamental or new principle of civil liability, but was a part of the law intended to allow the enforcement in the criminal action of the civil liability arising from the crime. By it the conviction of the

defendant for the crime is made the equivalent of a finding against him as to his civil liability to the party injured, and in case the injured party appears and so requests, the court may upon proof of the amount of the damages enter judgment therefor in the criminal action. And so it is declared in the Provisional Law for the application of the Penal Code (rule 51) that in *case of conviction* in the criminal action the court shall declare, among other things, "the civil lia- " bility incurred by those subject thereto who may have been " heard in the case."

It is otherwise, however, where the party injured does not appear in the criminal action and has not renounced "the " right to restitution, repair, or indemnity, * * * in an " express or positive manner" (articles 110-112, Law of Criminal Procedure), or where the judgment is one of acquittal. In all such cases the injured party is left to his remedy in the civil courts. This view is in accord with article 116 of the same Law of Criminal Procedure, which provides:

> "The extinction of the criminal action does not " carry with it the extinction of the civil action, unless " the extinction be caused by a final sentence declar- " ing that the act on which a civil action might be " based did not exist.
>
> "In other cases the person having a right of civil " action may institute before the civil jurisdiction, " and through the proper civil channels, an action " against the person who may be obliged to restore " the thing, to repair the damage, or indemnify the " losses suffered."

It is thus made clear that the judgment of acquittal in a criminal action, whereby that action becomes extinguished, does not have the effect to extinguish the civil action, except where the final judgment of acquittal is based on a finding that the *act* from which the civil action might have arisen did not exist. Such is not the case here. The judgment in the criminal action was not based on any such finding or

theory. On the contrary, the existence of the criminal act was in effect recognized in the judgment. It was there stated: "The evidence introduced by the prosecution indi-
" cates that the defendant may have been the author of the
" crime, but it is not conclusive."

It was not denied in the criminal action, nor is it questioned in this, that the storehouse and its contents were actually burned and completely destroyed, or that they were the property of the plaintiffs in this action. There has been and is no dispute of the fact of the burning which gave rise to both actions. The question in the criminal action was whether the defendant was criminally responsible to the United States for the burning. The question in this action is whether he is civilly responsible to the plaintiffs for the loss sustained by the destruction of their property.

The judgment in the criminal action was expressly on the ground that the evidence, though indicating the guilt of the defendant, did not establish his guilt beyond a reasonable doubt. For that reason, and for that reason only, the defendant was acquitted. There was no finding that the fact of the burning had not been established. Such fact was established and is not disputed. But as, in the mind of the court, there was "some doubt as to the guilt of the defendant," he was acquitted in accordance with the principle of section 57 of said General Order No. 58, which provides:

> "The defendant in a criminal action shall be pre-
> " sumed to be innocent until the contrary is proved,
> " and in a case of a reasonable doubt that his guilt is
> " satisfactorily shown, he shall be entitled to an ac-
> " quittal."

While, therefore, the criminal action was extinguished by the acquittal of the defendant for lack of sufficient evidence to establish his guilt, such acquittal did not have the effect to extinguish the right of plaintiffs in a civil action to try the question of the defendant's liability to them for the damages here claimed. That question is still open to be

tried and determined in the *civil* courts, and in accordance with the rules as to the degree and weight of evidence applicable to *civil* proceedings. And this is in harmony with article 133 of the Penal Code, which provides that—

> "Civil liability arising out of crimes or misde-
> " meanors shall be extinguished in the same manner
> " as other obligations, in accordance with the rules of
> " civil law."

Thus is declared the general rule in such cases. And it follows that civil liability arising from crimes or misdemeanors is not extinguished, and cannot be, under the rules of *criminal* law. It is only where there is a conviction in the criminal action, and the civil liability is by such conviction established under article 17 of the Penal Code that such liability may be declared in the judgment in that action. There is no other exception to the general rule that questions of civil liability are to be determined in civil proceedings. This is in accord with section 107 of said General Order No. 58, which, after declaring that the "privileges now secured " by law to the person claiming to be injured by the com-" mission of an offense to take part in the prosecution of the " offense, and to recover damages for the injury sustained by " reason of the same, shall not be abridged," and that "such " person may appear and shall be heard, either individually " or by attorney, at all stages of the case," further provides that the "court, upon conviction of the accused, may enter " judgment against him for the damages occasioned by his " wrongful act."

Authority is given the court by the section to enter judgment on the question of civil damages only in the event *of the conviction of the accused*, and then only *for the damages* occasioned by the wrongful act. No authority is given to enter any sort of judgment on that question where there is an acquittal or to enter judgment against civil liability in any event.

As the defendant was acquitted in the criminal action, there was no occasion or authority for any finding or declaration in that action as to his civil liability, and such a finding would have been wholly improper because unauthorized by law. That question is to be determined, and can only be determined, in the proper civil proceedings, where such matters are always and primarily cognizable, with the one exception stated, even under the Spanish law. Civil liability for a criminal act is not imposed as a penalty or punishment under the Spanish law any more than under American institutions. It arises by virtue of an obligation, founded upon the universal law of justice, to indemnify the injured party for damages sustained by reason of the unlawful act. It rests upon the same principle as an obligation arising from *any* wrongful or fraudulent act, whether criminal or not, and as a general rule is to be determined in the same manner and in the same character of proceeding—that is, in a civil and not a criminal action. The judgment of acquittal in the criminal action, therefore, is not within the principle of *res adjudicata* sought to be here applied, and is not a bar to this action even under the Spanish law. The plaintiffs are at liberty to prosecute this action without any limitation whatever upon their right by reason of that judgment.

It is not material here to inquire what the consequences would have been if the judgment in the criminal action had been one of conviction and the civil liability of the defendant had not been declared in the judgment. In the case of *United States vs. Catequista*, 1 Phil. Rep., 537, cited in the opinion of the Court of First Instance, the Supreme Court of the Philippine Islands said:

> "Such civil liability is a necessary consequence of
> " criminal responsibility (Penal Code, Art. 17), and
> " is to be declared and enforced in the criminal pro-
> " ceeding, except where the injured party reserves his
> " right to avail himself of it in a distinct civil action."

But in such case the civil action is exercised not as the principal action, but incidentally, and only in the event that a judgment of conviction is rendered. Without a conviction no "criminal responsibility" is established, and in that event the necessary condition precedent to a judgment for civil damages in the criminal action is not present, and therefore the civil liability cannot be declared or the question of its existence determined in such action. There is no warrant, as we understand it, for a declaration for or against civil liability in a criminal action, save only in a case where the criminal responsibility of the defendant is established. In such a case, under the Spanish law, civil liability for the criminal act follows as a necessary consequence, and may be declared if the injured party so requests in the criminal action. There is no authority, however, for a finding or a judgment *against* civil liability in a criminal action, not even if the defendant be acquitted any more than if he be convicted. In the absence of a judgment of conviction, the question of civil liability cannot be passed upon at all in the criminal action, for there is no law authorizing it, and the court can make no order with respect to such liability.

Moreover, we contend that the rule which requires a different and higher degree of proof to justify conviction in a criminal action than is necessary to establish civil liability for the criminal act was in force in the Philippines at the time of the institution of the criminal action here in question, and has been ever since.

As hereinbefore shown, it is provided by General Order No. 58, issued April 23, 1900, that in prosecutions for crime the defendant shall be presumed to be innocent until the contrary is proved, and shall be entitled to an acquittal unless his guilt is shown beyond a reasonable doubt. And by section 273 of the act No. 190 the principle that issues in civil actions are determined by the mere preponderance or superior weight of the evidence is clearly recognized. That section provides:

"SEC. 273. *Preponderance of evidence, how determined.*—In determining where the preponderance "or superior weight of evidence on the issues involved lies, the court may consider all the facts and "circumstances of the case, the witnesses' manner of "testifying, their intelligence, their means and opportunity of knowing the facts to which they are "testifying, the nature of the facts to which they "testify, the probability or improbability of their "testimony, their interest or want of interest, and "also their personal credibility so far as the same "may legitimately appear upon the trial. The court "may also consider the number of the witnesses, "though the preponderance is not necessarily with "the greatest number."

While this difference in the quantum of proof required in the two classes of actions may not have been, so far as we know, definitely enforced under the Spanish law, it has become, by reason of the recent radical changes in the legislation on the subject, of the greatest importance in the administration of justice in the Philippines. It is this fundamental and radical difference, more than any other reason perhaps, which renders obnoxious to American ideas of justice the thought that an adjudication in a criminal action may be interposed as conclusive in a civil case. The American rule is concisely and well stated in *Greenleaf* (vol. 1, sec. 537), where that author says:

"The jury in the civil action must decide upon *the* "*mere preponderance* of the evidence, whereas, in "order to a criminal conviction, they must be satisfied of the party's guilt, *beyond a reasonable doubt.*" (Italics ours.)

See also 3 *Greenleaf on Evidence,* sec. 29, and 1 *Wharton's Criminal Law*, sec. 1.

Both the distinction and the rule, which is its necessary and wholesome sequence, have been engrafted upon and are now part of the jurisprudence of the Philippine Islands, for

such is the effect of the stated provisions of said General Order No. 58 and of said act No. 190. A recent ruling of the Supreme Court of the Islands is also in point. The case of Martin Ocampo *et al.*, plaintiffs, *vs.* J. C. Jenkins, Judge, and Dean C. Worcester, defendants (decided December 24, 1909, Manila Official Gazette, vol. 8, No. 4, p. 128), was a petition to the Supreme Court of the Islands for a writ of prohibition. A criminal action had been instituted against the plaintiffs for the crime of libel and was pending on appeal in the Supreme Court. After the commencement of the criminal action, Worcester, the party who claimed to have been injured by the alleged libelous publication, instituted a civil action to recover damages from the plaintiffs for the injury. The object of the petition was to enjoin and prohibit the defendant Jenkins, who was one of the judges of the Court of First Instance, and the defendant, Worcester, the plaintiff in the civil action, from proceeding in the trial of that action until the criminal case should be finally determined. It was contended that a final judgment on the question of criminal liability would be also an adjudication of the question of civil liability for the alleged libel, and the plaintiffs relied on the case in which the judgment here complained of was rendered (reported in 8 Phil. Rep., 178) as authority for their contention. But the court decided otherwise, and denied the petition for the writ of prohibition. The decision squarely holds that the plea of *res adjudicata* cannot be successfully interposed except where the parties, the facts, and the questions involved are the same, and that as between civil and criminal actions a judgment in one is no bar to the prosecution in the other.

It is true the court undertook to distinguish that case from the case in which the judgment here was rendered, on the ground that the two actions there involved were based upon act No. 277 of the Philippine Commission, which declares that libel shall be punished as a crime, and gives to the person libeled a right of civil action against the offending party

for damages sustained by such libel. In the course of its opinion the court said:

"The theory of the plaintiffs is not that they are " not responsible in civil damages as a result of said " alleged libelous publication, but that the courts can " not proceed with the civil action until the criminal " action is determined and concluded. The plain- " tiffs rely upon the case of Almeida Chan Tanco *et* " *al. vs.* Abaroa (8 Phil. Rep., 178). The decision in " that case was based upon the provisions of the Penal " Code, relating to the right of civil actions or the " right to civil damages growing out of criminal acts.

* * * * * * *

"The said criminal action against a portion of the " present plaintiffs and the said civil action against " the said plaintiffs in the present action were based " upon act No. 277 of the Philippine Commission. " Said act (No. 277) provides for a criminal action " for the crime of libel, as well as a civil action for " any person libeled in violation of the provisions of " said act.

* * * * * * *

" The theory of the plaintiffs evidently is that the " result of the civil action must follow the result of " the criminal action; in other words, if it should " happen that the criminal action should finally be " dismissed and the defendants absolved from lia- " bility, that under no condition would they be liable " civilly; or, further, that the result of the criminal " action is *res judicata* and may be pleaded in case " the defendants are absolved from liability, as a bar " to any civil action which might be based upon the " same acts or publications. This theory appears to " be founded upon the provisions of the Penal Code. " Said act No. 277, however, clearly recognizes two " independent and distinct actions upon the theory " that there are two separate and distinct injuries re- " ceived from the crime of libel: one by the State and " the other by the private individual who may have " been injured by such libel.

"The plea of *res judicata* generally can not be inter- " posed except where the parties, facts, and questions " are the same."

Thereupon the court proceeded to show that the parties to the two actions were not the same, one being prosecuted by the United States and the other by Worcester; that the facts were similar, in that "the two causes of action were based "upon the same alleged libel or publication"; and continued thus:

> "The questions, however, in the two cases presented " to the court are very different. In the criminal " action the question was whether or not the acts of " the defendants were in violation of section 1 of act " No. 277. * * * In the civil action the ques- " tion presented for solution by the court was whether " or not the plaintiff (Mr. Worcester) had suffered " any damages by reason of said alleged libel or pub- " lication.
>
> * * * * * * *
>
> "The question presented by the plaintiffs herein is " not a new one. It has been discussed many times by " the courts and the text-book writers in relation with " legislation under the Government of the United " States. The rule adopted has been substantially " stated in the following form:
>
> "A judgment in a criminal prosecution constitutes " no bar or estoppel in a civil action based upon the " same acts or transactions, and conversely of a judg- " ment in a civil action sought to be given in evidence " in a criminal prosecution. The reason most often " given for this holding is that *the two proceedings " are not between the same parties.* Different rules as " to the competency of witnesses and weight of evi- " dence necessary to the findings in the two proceed- " ings also exist. As between civil and criminal ac- " tions, a judgment in one is no bar or estoppel to the " prosecution of the other. A judgment in a criminal " cause can not be pleaded as *res judicata* in a civil " action."

The court then referred to a number of authorities, most of which have been hereinbefore stated and discussed, and further said:

"As a general rule a verdict and judgment in a "criminal case can not be given in evidence in a civil "action. If the defendant was convicted in the crimi- "nal action it may have been upon the evidence of "the very plaintiff in the civil action; and if he was "acquitted it may have been by collusion with the "prosecutor. But, besides this, upon the same gen- "eral grounds there is no mutuality; the parties can- "not be the same; neither are the rules of decision "and course of proceeding the same; the defendant "as a general rule can not avail himself in the crimi- "nal trial of any admissions of the plaintiff in the "civil action; and, on the other hand, the jury in the "civil action must decide upon a mere preponder- "ance of the evidence, whereas, in order to have a "criminal conviction they must be satisfied of the "party's guilt, beyond a reasonable doubt; the same "principle renders a judgment in a civil action in- "admissible in evidence in a criminal prosecution. "It is also a principle of justice that no man ought "to be bound by proceedings to which he was a "stranger. In a criminal action for libel the real "person injured was not the party. In the criminal "action he had no opportunity to present evidence "showing the character of his injuries. The cause "was under the direction of the representative of the "State. He had no voice whatever in that case."

It is to be observed that the court in seeking to distinguish that case from the one in which judgment here complained of was rendered, did so on the stated ground that the earlier case appeared to be founded upon the provisions of the Penal Code relating to the right to civil damages growing out of criminal acts, whereas, that case was founded upon said act No. 277, which the court said, "clearly recognizes two inde- "pendent and distinct actions upon the theory that there are "two separate and distinct injuries received from the crime "of libel; one by the State and the other by the private in- "dividual who may have been injured by such libel."

We believe the law is correctly stated in the *Ocampo-Jenkins* case, and that the conclusion therein is a sound and

just one; but we contend that the suggested difference between the effect of the provisions of the act No. 277, and the provisions of the Civil and Penal Codes and of the Law of Criminal Procedure, relating to the two classes of actions arising out of crimes, is without sound reason to support it. The latter provisions, equally with the provisions of the act No. 277, recognize the right to institute two separate and distinct actions in all cases of wrongful acts defined by the Spanish law as crimes prior to the passage of the act No. 277. Under those provisions, whenever a crime was committed, two actions could be brought, one by the State to punish the crime and the other by the injured party to recover damages for the injury. True, there was the alternative right to the injured party to appear in the criminal action and, in the event of a conviction of the defendant, to have judgment for his damages in that action. And this is the only practical difference, in respect to criminal and civil actions for a crime, between the law as it formerly stood relating to crimes generally, and the act No. 277 relating to the crime of libel. The difference is one of form and procedure rather than of substantial right. And, indeed, it does not necessarily follow from anything contained in the act No. 277 that the party injured by a libel would not have the right to appear in a criminal action for the libel and there have judgment for damages for the injury, the same as under the law relating to other crimes, provided such law be still in force. There is no substantial difference, so far as concerns the question now under consideration, between the general law and the act No. 277. It follows, therefore, that the two cases are really not distinguishable upon any substantial basis, and that either the judgment here or the judgment in the case cited is wrong. We submit the present case is the one in which the error lies.

In view of all the foregoing, we contend:

(1) That there was no adjudication in the criminal action of the question of the *civil* liability of the defendant. The

only matter adjudicated in that action was the question of his *criminal* liability; and

(2) That the judgment of acquittal in the criminal action is not within the principle of *res adjudicata* and cannot be interposed as a bar to the present action for the reasons that (*a*) the parties in the two actions are not the same, (*b*) the question is not the same, though growing out of the same transaction, and (*c*) the same degree of proof essential to conviction of the defendant in the criminal action is not required to sustain a judgment against him for the damage claimed in this action.

Another feature of the case worthy of careful consideration is that civil liability for wrongful acts is not confined merely to acts punishable as crimes. Liability for damages resulting from acts or omissions not criminal, if due to fault or negligence, is expressly declared in the Spanish law. Article 1902 of the Civil Code provides that—

> "A person who by an act or omission causes dam-
> " age to another when there is fault or negligence
> " shall be obliged to repair the damage so done."

Of course, if the act or omission were without fault or negligence it would not be unlawful and no liability would attach, but if due to fault or negligence it would be unlawful, and hence the stated resultant liability, though no declared element of criminality were present. This seems to be the conception of the article referred to, and the thought is in entire harmony with the simple, ordinary principles of justice.

The complaint in this case appears to have been drawn with the view to meeting a possible situation within the terms of the article. The complaint charges that the building and stock of goods were burned by the defendant "maliciously or unlawfully." If the burning was done maliciously it was, of course, a criminal act. It may have been done wrongfully or unlawfully and yet without crimi-

nality. Under the complaint, evidence to show the true state of the case would be clearly admissible. But even if the complaint be construed as charging the greater degree of wrong-doing only, the lesser degree would be necessarily included in the greater, and evidence to show the latter situation would be admissible.

Every burning from which a civil liability may arise is not necessarily incendiary, and, independently of the question of criminal liability, there may exist the lesser wrong or fault referred to in article 1902 as a proper basis of civil liability. In this view of the case, we submit, the court below erred in holding the judgment of acquittal in the criminal action a bar to the present action. It is not necessary to prove the crime of arson in order to recover the damages here claimed.

In the contentions thus far presented we have proceeded upon the theory that the provisions of the Spanish law relating to the right of a person injured by the commission of a crime to appear in the criminal action and, in the event of conviction, to have judgment in that action against the defendant for civil damages, were still in force in the Philippine Islands when the criminal action here in question was instituted. We do not wish to be understood as conceding, however, that such was the case. On the contrary, we contend that all such provisions were repealed by the act No. 190, which was passed more than a year prior to the institution of the criminal action. If this be true it furnishes a further argument that the court below erred in holding the judgment in the criminal action decisive of the question in this case. The repealing provision of the act is contained in the chief paragraph of sec. 795, and reads as follows:

> "SEC. 795. *Repeal of existing codes, etc.*—All "codes, statutes, acts, decrees and orders and parts "thereof, heretofore promulgated, enacted or en- "forced in the Philippine Islands, prescribing the "procedure in civil actions or special proceedings in

"any court or tribunal are hereby repealed, and the "procedure in all civil actions and special proceed- "ings in all courts and tribunals shall hereafter be "in accordance with the provisions of this act."

There are several sub-paragraphs relating to *pending* actions and proceedings, as to which it is provided that the further procedure therein shall be in accordance with the Spanish law, except in so far as the provisions of the new law may be conveniently applied to such actions and proceedings.

In the 5th, 6th, and 7th chapters of the act full and detailed provisions are made (ch. 5) as to the pleadings required in civil actions in the Courts of First Instance, the character of the pleadings, etc.; (ch. 6) as to who shall be made parties plaintiff and defendant in such actions, who shall be allowed to intervene therein, who may be required to interplead for the purpose of litigating their claims, etc., and (ch. 7) as to the various proceedings in civil actions, the character and manner of relief to be granted therein, and the manner of taking exceptions and perfecting the same for appeal.

There is no recognition whatever in those chapters or elsewhere in the act of the right which the Spanish law gave to a party claiming to be injured by the commission of an offense to appear in the criminal prosecution of the offense and recover civil damages, nor is there any saving clause in the repealing section of the act to continue or preserve any such right. The repeal is most comprehensive in its terms. It embraces all *codes, statutes, acts,* and *orders,* or parts thereof, theretofore promulgated, enacted, or enforced, etc. Its terms include section 107 of General Order No. 58, which provided that the right of an injured party to appear and recover civil damages in a criminal action should not be abridged by anything contained *in that order.* They include all codes, statutes, and acts, or parts thereof, of the Spanish law upon which such right was based.

This view is not out of harmony with the act No. 277 making libel a crime and providing a civil remedy for damages to the injured party, passed within a month after such repeal. A consideration of the later act rather tends to show that in the passage of the earlier act the Commission considered that penal and civil actions arising out of crimes were thereby completely divorced. Why should the mode of procedure provided for the recovery of civil damages for the crime of libel be different from that already existing for the recovery of such damages in cases of other crimes? What reason could there be for such a difference?

The proposition is likewise supported by the provisions of section 143 of the act No. 190, which give to the losing party in a civil action the right of appeal from the final judgment of a Court of First Instance to the Supreme Court of the Islands, and prescribe the manner of perfecting such appeal. Especially is this true when said section is considered in connection with the act of Congress of July 1, 1902 (32 Stats., 691), which, as held by this court in the recent case of *Kepner vs. United States* (195 U. S., 100), took away the right of appeal by the Government (recognized by General Order No. 58, issued April 23, 1900), from a judgment of acquittal in a criminal action in a Court of First Instance in the Philippines, and, as we contend, likewise took away the right of appeal from such judgment (also recognized by said General Order No. 58) by the person injured by the criminal act. It would give rise to an anomalous situation, indeed, if it were held that in such case the right of appeal, though taken away from the Government, still exists as to the person injured by the crime, who was not a party to the proceeding. If we are right in this contention, it follows that since the act of July 1, 1902, there could be no appeal by a party claiming civil damages in a criminal action from a judgment of acquittal in such action. That the act No. 190 was intended to prescribe remedies and procedure applicable to *all* the then recognized causes of civil action in the Philippines is thus made manifest, for if such were not the fact the

strange situation would appear that as to an existing remedy for the recovery of civil damages in a criminal action there could be no appeal by the party for whom the remedy was provided, from a judgment prejudicial to his interests, whereas, the party proceeded against, the defendant in the criminal action, would have the right of appeal from a judgment against him; and, furthermore, a judgment for civil damages in the criminal action could only be had where the proof was sufficient to establish the defendant's guilt beyond a reasonable doubt, for in no other event could there be a conviction, whereas, in a civil action for damages sustained by the commission of a wrongful act not made a crime the plaintiff could have judgment upon a mere preponderance of the evidence.

The theory advanced as to the scope and effect of the repealing section of said act is likewise strengthened, for it can not be reasonably conceived that the Commission intended that there should exist the anomalous and complicated result which would follow if such were not the effect of the repeal.

The action here was not instituted until after the passage of said act No. 190. In view of the provisions of that act prescribing in detail the procedure in civil actions in the Philippines, and in view of the repeal thereby of all prior codes, statutes, acts, and orders, or parts thereof, relating to such procedure, we contend the action was properly brought, and that it was error to hold otherwise, as was in effect done by both courts below.

Furthermore, to thus restrict a party in the enforcement of his right to recover civil damages for a crime committed against his person or property, would be in violation of the constitutional provision that no person shall be deprived of life, liberty, or property without due process of law, or denied equal protection of the laws.

This provision of our Constitution was embodied in the instructions by the President to the Philippine Commission.

dated April 7, 1900, and is also incorporated in the act of Congress of July 1, 1902, wherein it is provided (sec. 5, in part) as follows:

> "That no law shall be enacted in said Islands which " shall deprive any person of life, liberty, or property, " without due process of law, or deny to any person " therein the equal protection of the laws."

We do not propose to enter upon an extended discussion of this provision. It is sufficient to say that by the act of July 1, 1902, it was made the supreme law of the Philippine Islands, and that under it every person in the Islands has the right to demand the same treatment accorded to others under the same conditions and circumstances. Any law which prevents a person from appealing from a judgment against him by an inferior court to the highest court of the Islands, with the same rights and privileges in respect thereto as are accorded to other litigants under similar circumstances and conditions, is clearly contrary to said provision, and for that reason is null and void (*G., C. & S. F. Ry. vs. Ellis,* 165 U. S., 150). Comment is unnecessary to show the application of the principle to the case at bar.

If under the laws intended to apply to the Philippines a person injured by a wrongful act not punishable as a crime may establish his claim to damages for the injury in a civil action, upon a mere preponderance of the evidence in his favor, with the privilege of appealing to the highest court in the land if necessary to the protection of his interests; and a person injured by the commission of an act which is a crime does not enjoy such right or privilege, but must establish his claim in a criminal action, upon evidence sufficient to establish the guilt of the defendant beyond a reasonable doubt (which is just what the judgment below means), and with no right of appeal, then, indeed, in view of section 5 of the act of July 1, 1902, there is something radically wrong with said laws.

It needs no argument to show that, under such conditions, the person suffering an injury because of a criminal act would not have the protection of the laws equally with the person injured by an act wrongful in its nature but not criminal. The result would be manifest inequality.

II.

Most of what we have said in support of the first assignment of error applies also, and with equal force, to the second. For, if we are right in the contention that the judgment in the criminal action is not decisive of the question in the present case, it necessarily follows that the courts below erred in holding, as they in effect did hold, that a conviction in the criminal action was an indispensable prerequisite to recovery of civil damages. And it was not necessary, therefore, for the plaintiffs to allege in their complaint that the defendant was convicted in the criminal action, nor that they reserved the right to bring a separate civil action for the damages claimed.

The fundamental basis of the judgment below is that there can be no recovery of civil damages by a party who has suffered injury from a criminal act unless and until there shall be a conviction of the party charged with the crime. We submit that such is not the law, and that the judgment should be reversed.

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CHANTANGCO *v.* ABAROA.

ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 2. Submitted October 24, 1910.—Decided November 28, 1910.

The general rule of the common law is that a judgment in a criminal proceeding cannot be read in evidence in a civil action to establish any fact there determined. The parties are not the same and different rules of evidence are applicable.

Identity of parties will not always operate to make a judgment in a criminal action admissible in a civil action; there must be identity of issue, *Stone* v. *United States*, 167 U. S. 178, although as held in *Coffey* v. *United States*, 116 U. S. 436, when the facts are ascertained in a criminal case as between the United States and the defendant they cannot be again litigated as between him and the United States as the basis of any statutory punishment denounced as a consequence of the existence of the facts.

In a case coming from the Philippine Islands, however, this court will not apply the common-law rule as to effect to be given in a subsequent civil case to a judgment in a criminal case, but will consider only whether the local law of the Philippine Islands has been rightly applied.

The local law in the Philippine Islands, which is still in force, not having been suspended by legislation, is that indemnity for damages in penal cases is a consequence of the commission of the crime and a verdict of acquittal carries with it exemption from civil liability. This rule applies even against one who in the criminal action attempted to reserve his rights to bring a civil action.

THE facts, which involve the right of recovery in the Philippine Islands of damages caused by alleged crimi-

nal acts of defendant, in a civil action after the defendant's acquittal in a criminal action, are stated in the opinion.

Mr. Aldis B. Browne, with whom *Mr. W. A. Kincaid*, *Mr. Alexander Britton*, and *Mr. Evans Browne* were on the brief, for plaintiffs in error:

There was no determination in the criminal action of the matter in controversy in this action such as to warrant the application of the principle of *res judicata*. A judgment in a criminal action is not evidence in a civil action to support the defense of former adjudication, even though both actions involve the same subject-matter or transaction. Greenleaf on Evidence, § 537; Jones on Evidence, § 589, p. 745; 1 Wharton on Evidence, § 776; Herman on Estoppel, § 413; 2 Black on Judgments, § 529; 1 Freeman on Judgments, § 319. Such has been the rule in England from an early day, and it has always been the law in this country. *King* v. *Boston*, 4 East. 572; *Jones* v. *White*, 1 Strange, 67; Buller's Nisi Prius, 233; *Petrie* v. *Nuttall*, 11 Excheq. Rep. 569; *Justice* v. *Gosling*, 12 C. B. 39–44; *Cottingham* v. *Weeks*, 54 Georgia, 275; *Marceau* v. *Travelers' Insurance Co.*, 101 California, 338; *Burke* v. *Wells, Fargo & Co.*, 34 California, 60–62; *Cluff* v. *Insurance Co.*, 99 Massachusetts, 317; *Morch* v. *Raubitschek*, 159 Pa. St. 559; *Betts* v. *New Hartford*, 25 Connecticut, 180; *Corbley* v. *Wilson*, 71 Illinois, 209; *Johnson* v. *Girdwood*, 143 N. Y. 660; *Chamberlain* v. *Pierson*, 87 Fed. Rep. 420–424; *Dyer County* v. *Railroad Co.*, 87 Tennessee, 712; *United States* v. *Jaedicke*, 73 Fed. Rep. 100; *Van Hoffman* v. *Kendall*, 17 N. Y. Supp. 713; *United States* v. *Schneider*, 35 Fed. Rep. 107; *McDonald* v. *Starke*, 176 Illinois, 456.

There are many other cases in which the principle has been applied. *Gray* v. *McDonald*, 104 Missouri, 303, 309; *Wilson* v. *Manhattan Ry. Co.*, 20 N. Y. Supp. 852; *Skid-*

more v. *Bricker*, 77 Illinois, 164; *Tumlin* v. *Parrott*, 82 Georgia, 732–735; *Sibley* v. *St. Paul F. & M. Ins. Co.*, 9 Biss. 31; *State* v. *Carron*, 73 N. H. 434.

A judgment in a criminal prosecution does not support the plea of *res judicata* in a civil action. *Frierson* v. *Jenkins*, 72 S. Car. 341; see also *Britton* v. *State*, 77 Alabama, 202, 209; *State* v. *Bradnack*, 69 Connecticut, 212, 214, 215; *People* v. *Kenyon*, 93 Michigan, 19, and note in 5 Am. & Eng. Anno. Cases, pp. 78–80; *Stone* v. *United States*, 167 U. S. 178, distinguishing *Coffey* v. *United States*, 116 U. S. 436, 444, and *Gelston* v. *Hoyt*, 3 Wheat. 246; *Commonwealth* v. *Feldman*, 131 Massachusetts, 588; *Cooper* v. *Commonwealth*, 106 Kentucky, 909.

The action is to recover a forfeiture which would have been part of the penalty imposed in the former criminal proceeding, and is between the same parties; the previous acquittal in the criminal action is a bar. *State* v. *Meek*, 112 Iowa, 338; *United States* v. *Butler*, 38 Fed. Rep. 498–499; *State* v. *Adams*, 72 Vermont, 253; *Commonwealth* v. *Ellis*, 160 Massachusetts, 165, do not apply.

Even where both actions are of the same nature, the principle of *res judicata* requires that there shall be identity of parties, either in fact or in privity of interest, as well as identity of the matter at issue. *Robins* v. *Chicago*, 4 Wall. 657, 672; *Amer. Bell Tel. Co.* v. *National Telephone Co.*, 27 Fed. Rep. 657; *Frank* v. *Wedderin*, 68 Fed. Rep. 818; *Weller* v. *Hershey*, 89 Fed. Rep. 575; *Houke* v. *Cooper*, 108 Fed. Rep. 992; *Litchfield* v. *Goodnow*, 123 U. S. 549; *Wilgus* v. *Germain*, 72 Fed. Rep. 773, 775; *Hall* v. *Finch*, 106 U. S. 261; *Stryker* v. *Goodnow*, 123 Fed. Rep. 527; *Southern Pacific R. R. Co.* v. *United States*, 168 U. S. 48; *Russell* v. *Place*, 94 U. S. 606, 608; *Last Chance Mining Co.* v. *Tyler Mining Co.*, 157 U. S. 683, 688; *New Orleans* v. *Citizens' National Bank*, 167 U. S. 371; *Pacific Railway* v. *United States*, 183 U. S. 519, 528; Greenleaf on Evidence, § 523; *Lovejoy* v. *Murray*, 3 Wall.

1, 10; see article 1252 of the Civil Code of the Philippine Islands; *Gaines* v. *Hennen*, 24 How. 553; Art. 105 of the Law of Criminal Procedure; § 107 of General Order No. 58, issued April 23, 1900; Act No. 190, §§ 306, 307, United States Philippine Commission in 1901; §§ 1908, 1911 of the Code of Civil Procedure of California; and see *Tanguinlay* v. *Quinos*, 10 Philippine Rep. 360; *Merchant* v. *International Bank*, 9 Philippine Rep. 554; *O'Connell* v. *Maygua*, 8 Philippine Rep. 422.

The provisions seem to be in entire accord with the general rule on the subject as established by the decisions of this court. *Cromwell* v. *County of Sac*, 94 U. S. 351, 356; *Fayrweather* v. *Rich*, 195 U. S. 276, 299.

There was no brief filed for defendant in error.

MR. JUSTICE LURTON delivered the opinion of the court.

This is a writ of error to the Supreme Court of the Philippine Islands to review a judgment affirming a judgment of the court of the first instance in favor of the defendant.

The action was to recover indemnification of damages for the destruction of a storehouse and a stock of merchandise therein, valued at $58,473.49, Mexican, which the complaint alleged was "burned maliciously or unlawfully by Eduardo Abaroa," the defendant to the complaint, and defendant in error here.

The defense was, first, a general denial, and second, that the defendant, in a criminal action for the same burning and damage alleged, had been acquitted and held not guilty of the malicious burning now alleged, and in consequence of such judgment was not liable in a civil action for any damage to the plaintiff. The judgment in the criminal proceeding referred to was in these words:

"The evidence introduced by the prosecution indicates

that the defendant might have been the author of the crime, but it is not conclusive. All persons charged with crime are presumed to be innocent until they are proven otherwise. There being in my mind some doubt as to the guilt of the defendant, I should and do hereby acquit him, with the costs of these proceedings de oficio, and the attachment heretofore levied on his property is hereby vacated, reserving to the complaining witness whatever right he may have to bring a civil action against the said Eduardo Abaroa."

Upon a final hearing upon all of the proofs the court of first instance adjudged that the cause of action alleged and proved was one arising from the criminal act which was the subject of the former criminal proceeding; and that the defendant having been acquitted in the criminal action was not civilly liable. This judgment was affirmed by the Supreme Court of the Philippine Islands upon an elaborate opinion.

We have not had the benefit of either brief or argument for the defendant in this writ of error, but have found much assistance in the opinions of each of the Philippine courts, as well from very helpful briefs filed by learned counsel for the plaintiff in error. The contention which has been very forcibly pressed is that the judgment of acquittal in the criminal action does not operate as a bar to a subsequent civil action for indemnification of damages resulting from the same malicious or unlawful burning of the house and goods of the plaintiff, which was charged in the criminal action.

The proposition upon which the Supreme Court of the Philippine Islands grounded its judgment affirming that of the lower court in favor of the defendant Abaroa was, "That it has not been alleged or shown by the plaintiffs, as a cause of action instituted civilly against the defendant, that the aforesaid fire was caused through any fault or negligence on the part of the defendant, nor is there

shown any motive or cause distinct from that act, the subject of the case already terminated in accordance with the provisions of articles 1093, 1902 and 1903 of the Civil Code;" and second, that one who is not criminally responsible for a crime or misdemeanor cannot be made civilly responsible for the crime of which he has been acquitted.

The general rule of the common law is that a judgment in a criminal proceeding cannot be read in evidence in a civil action to establish any fact there determined. The reason for this rule is, primarily, that the parties are not the same, and, secondarily, that different rules of evidence are applicable. In the old case of *Jones* v. *White*, 1 Strange, 67-68, Eyre, J., said, "If a verdict be given in evidence, it must be between the same parties; and therefore an indictment, which is at the suit of the King, cannot be read in an action which is at the suit of the party." The requisite of mutual estoppel is essential to make a judgment in one action obligatory in another, although the point in issue is the same in each case. Unless the parties are the same the matter is *res inter alios.* Buller's Nisi Prius, 233; Wharton's Law of Evidence, vol. 1, § 776; *Dyer* v. *Railroad*, 87 Tennessee, 712.

Neither will identity of parties always operate to make a judgment in a criminal action admissible in evidence in a civil action. There must be identity of issue. Thus in *Stone* v. *United States*, 167 U. S. 178, 187, Stone was sued by the United States to recover the value of timber alleged to have been cut by him from public lands. He had been theretofore indicted, tried and acquitted for unlawfully cutting the same timber from the public lands, and plead this judgment as a bar to a suit for civil liability. This was held to be no defense, and *Coffey's Case*, 116 U. S. 436, distinguished as having been placed upon the ground "that the facts ascertained in a criminal case, as between the United States and the claimant, could

not be again litigated between them, as the basis of any *statutory punishment* denounced as a consequence of the existence of the facts." With respect to the application of *Coffey's case*, Mr. Justice Harlan, for the court, said:

"In the present case the action against Stone is purely civil. It depends entirely upon the ownership of certain personal property. The rule established in *Coffey's case* can have no application in a civil case not involving any question of criminal intent or of forfeiture for prohibited acts, but turning wholly upon an issue as to the ownership of property. In the criminal case the Government sought to punish a criminal offense, while in the civil case it only seeks, in its capacity as owner of property, illegally converted, to recover its value. In the criminal case his acquittal may have been due to the fact that the Government failed to show, beyond a reasonable doubt, the existence of some fact essential to establish the offense charged, while the same evidence in a civil action brought to recover the value of the property illegally converted might have been sufficient to entitle the Government to a verdict. Not only was a greater degree of proof requisite to support the indictment than is sufficient to sustain a civil action; but an essential fact had to be proved in the criminal case, which was not necessary to be proved in the present suit. In order to convict the defendant upon the indictment for unlawfully, wilfully and feloniously cutting and removing timber from lands of the United States, it was necessary to prove a criminal intent on his part, or, at least, that he knew the timber to be the property of the United States. *Regina* v. *Cohen*, 8 Cox C. C. 41; *Regina* v. *James*, 8 Car. & P. 131; *United States* v. *Pierce*, 2 McLean, 14; *Cutter* v. *State*, 36 N. J. Law, 125, 126. But the present action for the conversion of the timber would be supported by proof that it was in fact the property of the United States, whether the de-

fendant knew that fact or not. *Woodenware Co.* v. *United States*, 106 U. S. 432. An honest mistake of the defendant as to his title in the property would be a defense to the indictment, but not to the civil action. Broom's Leg. Max. (5th ed.) 366, 367. It cannot be said that any fact was conclusively established in the criminal case, except that the defendant was not guilty of the public offense with which he was charged. We cannot agree that the failure or inability of the United States to prove in the criminal case that the defendant had been guilty of a crime, either forfeited its right of property in the timber or its right in this civil action, upon a preponderance of proof, to recover the value of such property."

There are peculiarities about the character of the action now under consideration which, as will appear later, may bring it under the principles of *Coffey* v. *United States*, *supra*, rather than *Stone* v. *United States*, the indemnification here sought being a part of the punishment attached to the offense of which the defendant has been acquitted.

The case is, however, one which we conceive must be governed by the local law of the Philippine Islands, and the single question to which we need address ourselves is as to whether that law was rightly applied by the local tribunals.

Article 1902 of the Civil Code in force in the Philippine Islands reads thus: "A person who by an act or omission causes damage to another when there is fault or negligence, shall be obliged to repair the damage so done." By §§ 1092 and 1093 of the same code provision is made for the enforcement of civil liability, varying in character according to the origin of the liability. Thus, § 1092 provides that civil obligations arising from crimes and misdemeanors shall be governed by the provisions of the Penal Code. On the other hand, § 1093 provides that, "Those arising from acts or omissions, in which faults or negligence, not punished by law, occurs, shall

be subject to the provisions of Chapter second of Title sixteen of this book." The action here involved comes directly under § 1092 above set out, and is not an action arising from "fault or negligence, not punished by law." The complaint alleges that the act of burning was "malicious and unlawful," and not that it was the result of any "fault or negligence." This was the construction placed upon the complaint by both the courts below, and is a construction not challenged here. It follows that we must turn to the Penal Code to discover when a civil action arises out of a crime or misdemeanor, and the procedure for the enforcement of such civil liability. Article 17 of the Penal Code reads as follows: "Every person criminally liable for a crime or misdemeanor is also civilly liable." May this civil liability be enforced without a prior legal determination of the fact of the defendant's guilt of crime? Does civil liability exist at all if the defendant has been found not guilty of the acts out of which the civil liability arises? The opinion of the court below was that a judgment of conviction was essential to an action for indemnification under the applicable local law. To this conclusion we assent, upon the following considerations:

First, by the positive legislation of the Philippine Codes, civil and criminal, a distinction is drawn between a civil liability which results from the mere negligence of the defendant and a liability for the civil consequences of a crime by which another has sustained loss or injury.

Second, the plain inference from Article 17, above set out, is that civil liability springs out of and is dependent upon facts which if true would constitute a crime or misdemeanor.

Third, the Philippine Code of Procedure plainly contemplates that the civil liability of the defendant shall be ascertained and declared in the criminal proceedings.

Thus § 742 of the Code of Criminal Procedure, after

requiring that in a criminal proceeding all of the minor or incidental offenses included in the principal crime shall be decided, adds: "All questions relating to the civil liability which may have been the subject matter of the charge shall be decided in the sentence."

By § 108 of the same code the prosecuting official is required to prosecute the right of the injured person to restitution or indemnity, unless such person renounces the right.

By § 112 of the same code the civil action is held to be part of the criminal action, "unless the person injured or prejudiced renounces the same or expressly reserves the right to institute it after the conclusion of the criminal action."

In *United States* v. *Catequista*, 1 Philippine Rep. 537, 538, the court below failed to determine the liability of the defendant to indemnify the person injured by the misdemeanor of which he had been convicted. Concerning this, Ladd, J., for the court, said:

"The court also erred in not determining in the judgment the civil liability of the defendant for the *daños* and *prejuicios*, which resulted from the criminal act. Such civil liability is a necessary consequence of criminal responsibility, (Penal Code, article 17,) and it is to be declared and enforced in the criminal proceeding, except where the injured party reserves his right to avail himself of it in a distinct civil action. Code of Criminal Procedure of Spain, article 112, Provisional Law for the Application of the Penal Code in the Philippines, article 51, No. 4. No such waiver or reservation is disclosed by the record here."

It is true that one of the plaintiffs in the present case reserved whatever right he may have had to bring a civil action. This was obviously of no avail, inasmuch as there resulted a judgment for the defendant, and the plain inference from the foregoing is that a verdict of ac-

quittal must carry with it exemption from civil responsibility.

The effect of the application of the substantive law of the Philippine Islands given by the court below, not only in the present case but in the prior cases cited above, accords with the interpretation of identical provisions in the law of Spain by the Supreme Court of that kingdom, as shown by citations from the Spanish Supreme Court Reports. Some of these we have not been able to verify. We have, however, examined the decision of that court cited as of January 3, 1877. In that case the defendant had been tried and acquitted upon a criminal complaint. Notwithstanding this result, the trial court gave a judgment indemnifying the injured person for a loss supposed to have been suffered by him as a consequence of the crime of which the defendant had been acquitted. This judgment was annulled. Upon this point the court, in substance, said that indemnity for damages in penal cases was a consequence of the commission of a crime. The defendant was, therefore, not liable civilly, inasmuch as he had been found not liable criminally.

The foregoing considerations eliminate any question of the effect of such a judgment of acquittal under the principles of the common law, and require an affirmance of the judgment of the court below as properly based upon the applicable substantive law of the Philippine Islands, which has not been superseded by legislation since the establishment of the present Philippine Government.

Judgment affirmed.